INDIAN CLAIMS COMMISSION PROCEEDINGS

(2004) 17 ICCP

Reports

Kahkewistahaw First Nation
1907 Surrender Claim (Mediation)

Alexis First Nation Inquiry
TransAlta Utilities Rights of Way Claim

Chippewa Tri-Council Inquiry
Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Mnjikaning (Rama) First Nation
Coldwater-Narrows Reservation Surrender Claim

Mississaugas of the New Credit First Nation Inquiry
Toronto Purchase Claim

Canupawakpa Dakota First Nation Inquiry
Turtle Mountain Surrender Claim

Responses

Responses of the Minister of Indian Affairs and Northern Development to the Lax Kw'alaams Indian Band Inquiry, to the Friends of the Michel Society 1958 Enfranchisement Inquiry, and to the Roseau River Anishinabe First Nation Medical Aid Inquiry

Indian Claims Commission Proceedings

A Publication of

The Indian Claims Commission

(2004) 17 ICCP

Chief Commissioner

Renée Dupuis

Commissioners

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Sheila G. Purdy

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CONTENTS

Letter from the Chief Commissioner
v

Abbreviations
vii

REPORTS

Kahkewistahaw First Nation
1907 Surrender Claim (Mediation)
3

Alexis First Nation Inquiry
TransAlta Utilities Rights of Way Claim
21

Chippewa Tri-Council Inquiry
Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Mnjikaning (Rama) First Nation
Coldwater-Narrows Reservation Surrender Claim
187

Mississaugas of the New Credit First Nation Inquiry
Toronto Purchase Claim
227

Canupawakpa Dakota First Nation Inquiry
Turtle Mountain Surrender Claim
263

RESPONSES

Re: Lax Kw'alaams Indian Band Inquiry
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Phil Fontaine, Indian Claims Commission,
December 31, 2001
355

Re: Friends of the Michel Society 1958 Enfranchisement Inquiry
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Phil Fontaine, Indian Claims Commission,
October 2, 2002
357

Re: Roseau River Anishinabe First Nation Medical Aid Inquiry
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Renée Dupuis, Indian Claims Commission,
September 17, 2003
359

THE COMMISSIONERS
361

FROM THE CHIEF COMMISSIONER

On behalf of the Commissioners of the Indian Claims Commission, I am pleased to present this the 17th volume of the *Indian Claims Commission Proceedings*. This volume includes five reports and reproduces responses from the Minister of Indian Affairs and Northern Development to recommendations made by the Commission in three previous inquiries.

The first report, released in January 2003, relates the results of a successful mediation. The report recounts how the Kahkewistahaw First Nation actively pursued for 13 years their 95-year-old claim, despite two rejections by Canada. The Kahkewistahaw First Nation first came to the Commission through its inquiry process, as reported in (1998) 8 ICCP 3. The present report summarizes the events leading to the conclusion of this long-outstanding claim and the role the Commission mediation services provided in its successful resolution.

In March 2003, the Commission issued its report into the Alexis First Nation's claim relating to the federal Crown's grant of three rights of way to the Calgary Power Company on the Alexis reserve during the 1950s and 1960s. The Commission found that Canada had breached a number of its fiduciary duties and recommended that the claim be accepted for negotiation.

The third and fourth reports, issued in March and June 2003, respectively, involve claims that were accepted by Canada for negotiation under the Specific Claims Policy without the need for a full inquiry. In August 1996, the Commission commenced its inquiry process and chaired the first of many face-to-face meetings (planning conferences) into the Chippewa Tri-Council Coldwater-Narrows Reservation claim. Following additional research and supplemental legal arguments submitted by the First Nation, the claim was once again placed before the Claims Advisory Committee for review. In July 2002, the Minister of Indian Affairs wrote the First Nations with an offer to negotiate this claim. The First Nations accepted Canada's offer, and the claim entered the negotiation process, which brought the need for a full inquiry to an end. The fourth report summarizes the inquiry into the Mississaugas of the New Credit First Nation's Toronto Purchase claim. Once again in this instance the Commission's unique process of holding planning conferences, where the parties come together – in many cases for the first time – to discuss the issues and determine any further research, resulted in an offer to negotiate without the need of a full inquiry.

The final report published in this volume is the Commission's inquiry into the claim of the Canupawakpa First Nation involving the Turtle Mountain Surrender, issued in July 2003. The Commission found that the surrender of Turtle Mountain Indian Reserve (IR) 60 was valid, but recommended that the Government of Canada, in consultation with the Canupawakpa and Sioux Valley First Nations, acquire an appropriate part of the lands once part of the reserve to be designated for the important ancestral burial grounds that it is.

Also included in this volume are three responses from the Minister of Indian Affairs and Northern Development. In his letters, the Minister writes that the Government of Canada has rejected the Commission's recommendations in all three inquiries: the Lax Kw'alaams Indian Band Inquiry, Friends of the Michel Society 1958 Enfranchisement Inquiry, and the Roseau River Anishinabe First Nation Medical Aid Inquiry.

Renée Dupuis
Chief Commissioner

105-01686/

ABBREVIATIONS

AC	Appeal Cases
BCSC	British Columbia Supreme Court
BCR	Band Council Resolution
CA	Court of Appeal
CLSR	Canada Lands Surveys Records
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DOJ	Department of Justice
DSGIA	Deputy Superintendent General of Indian Affairs
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FTR	Federal Trial Reports
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
NSCA	Nova Scotia Court of Appeal
PC	Privy Council
PHI	Public History Inc.
QB	Court of Queen's Bench
RSA	Revised Statutes of Alberta
RSC	Revised Statutes of Canada
SA	Statutes of Alberta
SC	Statutes of Canada
SCC	Supreme Court of Canada

SCR	Canada Supreme Court Reports
SCW	Specific Claims West
SGIA	Superintendent General of Indian Affairs
TD	Trial Division
WWR	Western Weekly Reports
YTCA	Yukon Territory Court of Appeal

REPORTS

Kahkewistahaw First Nation
1907 Surrender Claim (Mediation)
3

Alexis First Nation Inquiry
TransAlta Utilities Rights of Way Claim
21

Chippewa Tri-Council Inquiry
Beausoleil First Nation
Chippewas of Georgina Island First Nation
Chippewas of Mnjikaning (Rama) First Nation
Coldwater-Narrows Reservation Surrender Claim
187

Mississaugas of the New Credit First Nation Inquiry
Toronto Purchase Claim
227

Canupawakpa Dakota First Nation Inquiry
Turtle Mountain Surrender Claim
263

INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE KAHKEWISTAHAW FIRST NATION 1907 SURRENDER CLAIM

JANUARY 2003

CONTENTS

PART I ***INTRODUCTION*** 7
Map 1: Claim Area Map 9
The Commission's Mandate and Mediation Process 10

PART II ***A BRIEF HISTORY OF THE CLAIM*** 12
Map 2: Kahkewistahaw Indian Reserve 14

PART III ***NEGOTIATION AND MEDIATION OF THE CLAIM*** 16

PART IV ***CONCLUSION*** 18

PART I

INTRODUCTION

The resolution of an Indian claim can take many years and outlast many of the individuals and elders who identified most intensely with the loss. This report deals with such a claim. The Kahkewistahaw First Nation's claim, outstanding for almost 95 years, had been pursued actively under the Government of Canada's specific claims process for 13 years, and it was rejected twice. In 2002, with the assistance of the Indian Claims Commission (ICC), the claim was successfully resolved.

This report will not provide a full history of the Kahkewistahaw First Nation claim. The Commission has discussed the issues involved in the 1907 surrender claim and the inquiry process in its February 1997 publication *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry*.[1] The goal of this report is to summarize the events leading up to settlement of the claim and to outline the role of the Commission in the resolution process. Ralph Brant, Director of Mediation, led the negotiation process, assisted by other Commission personnel at various points along the way.

On March 2, 1989, the Kahkewistahaw First Nation formally submitted its claim seeking "recognition of [its] claims and compensation for the losses and damage sustained" as a result of the 1907 surrender.[2] It argued that the claim should be validated under the federal government's Specific Claims Policy based on its allegations that the Kahkewistahaw surrender of January 28, 1907, was made under duress, undue influence, and negligent misrepresentation, and because the surrender bargain was unconscionable. The First Nation also alleged that the surrender was invalid because Canada failed to comply strictly with the requirements of the *Indian Act*, breached its fiduciary obligation to the First Nation by the manner in which it obtained the surrender, and violated a requirement of Treaty 4 by failing to obtain the consent of all Kahkewistahaw members interested in the reserve.

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[1] Indian Claims Commission, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

[2] William J. Pillipow, Barrister & Solicitor, to P. Cadieux, Minister, Department of Indian Affairs, March 2, 1989 (ICC Documents, p. 465), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 10.

In response to the First Nation's submission, the Specific Claims Branch of Indian Affairs undertook a review of the claim, which was completed in January 1992.[3] That research was presented to Kahkewistahaw in a meeting on April 14, 1992, following which the First Nation submitted an update to its position.[4]

Two years later, on being advised of Canada's preliminary position – that the 1907 surrender did not give rise to a lawful obligation to Kahkewistahaw – the First Nation formally asked the Commission to conduct an inquiry into this claim. Although Kahkewistahaw provided Canada with a further supplemental submission in response to the preliminary rejection of the claim,[5] Canada reiterated that it had breached no duties to the First Nation.[6]

Ultimately, on August 31, 1994, the Commission decided to conduct an inquiry[7] pursuant to its mandate under the *Inquiries Act*. The parties were brought together to discuss the claim and to clarify the many related issues, evidence, and opposing legal positions. The Commission's process also allowed for the exchange of documents and provided a forum for full and open discussion. The inquiry process gave Kahkewistahaw First Nation the opportunity to put forward new evidence and arguments, and the Commission concluded:

---

[3] Department of Indian Affairs, "Specific Claims Branch Review of Kahkewistahaw Band's Claim Concerning the 1907 Surrender," January 1992 (ICC Documents, pp. 649–752), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 10.

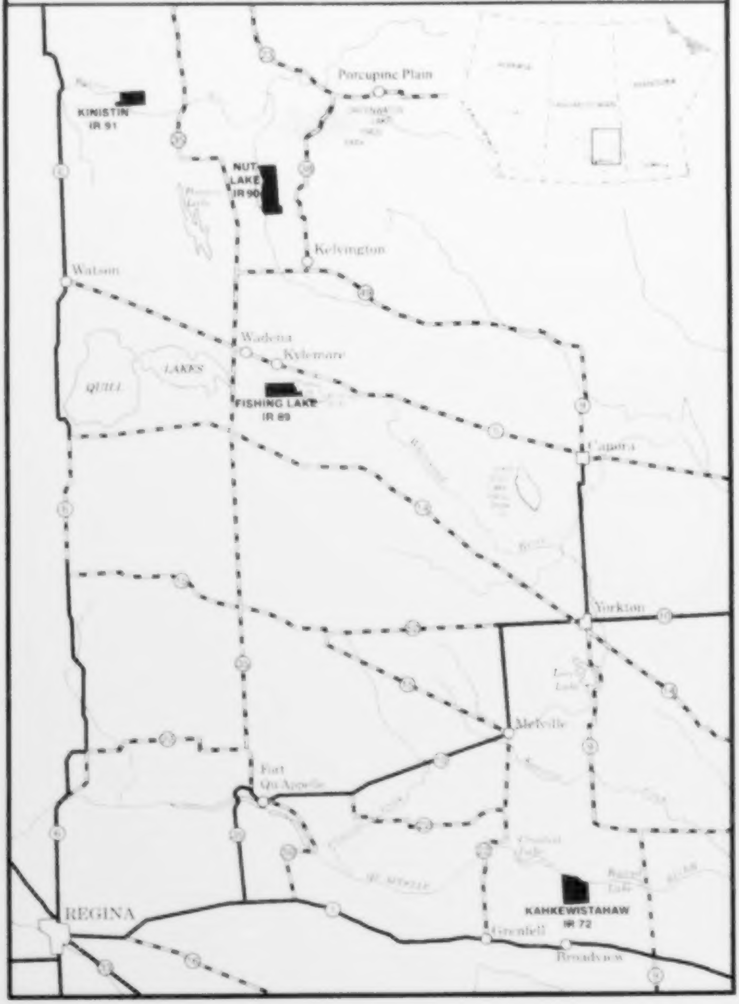
[4] William J. Pillipow, Pillipow & Company, to Jeannie Jeffers, Specific Claims Branch West, April 28, 1992, enclosing "Summary of Legal Position of Band," undated (ICC Documents, pp. 754–72), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 10.

[5] Stephen Pillipow, Pillipow & Company, to Jack Hughes, Specific Claims West, June 30, 1994, enclosing Pillipow & Company, "Supplemental Submission to the Minister of Indian Affairs and Northern Development, Kahkewistahaw First Nation Specific Claim – Land Surrender of 1907," June 1994 (ICC Documents, pp. 776–801), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 10.

[6] Jack Hughes, Senior Claims Advisor, Specific Claims West, to Chief Louis Taypotat and Council, Kahkewistahaw First Nation, August 10, 1994 (ICC Documents, pp. 858–59); Stephen Pillipow, Pillipow & Company, to Jack Hughes, Senior Claims Advisor, Specific Claims West, August 11, 1994 (ICC Documents, p. 860); Jack Hughes, Senior Claims Advisor, Specific Claims West, to Stephen Pillipow, Pillipow & Company, August 25, 1994 (ICC Documents, p. 861), as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 10.

[7] Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief and Council, Kahkewistahaw First Nation, September 2, 1994; Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Ron Irwin, Minister of Indian and Northern Affairs, and Allan Rock, Minister of Justice and Attorney General, September 2, 1994, as quoted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 10.

Claim Area Map


Porcupine Plain
KINISTIN
IR 91
NUT LAKE
IR 90
Kelvington
Watson
Wadena
Kylemore
QUILL
LAKES
FISHING LAKE
IR 89
Canora
Yorkton
Melville
Fort
Qu'Appelle
REGINA
KAHKEWISTAHAW
IR 72
Grenfell
Broadview

> [W]e agree with the Kahkewistahaw First Nation that the Government of Canada breached fiduciary obligations owed to these aboriginal people. The government not only failed in its obligation to protect the Kahkewistahaw Band but served in fact as a cunning intermediary in procuring a surrender that can only be described as unconscionable and tainted in its concept, passage, and implementation.[8]

Canada ultimately reconsidered and accepted the Kahkewistahaw First Nation claim for negotiation,[9] as recommended by the ICC.

With the letter of acceptance, the process of negotiating a settlement began. At the joint request of the First Nation and Canada, the Commission agreed to act as facilitator.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. It was established by Order in Council on July 15, 1991, followed by the appointment of Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, as Chief Commissioner. The ICC became fully operative with the appointment of six Commissioners in July 1992.

The Commission's mandate is twofold: it has the authority (1) to conduct inquiries under the *Inquiries Act* into specific claims that have been rejected by Canada, and (2) to provide mediation services for claims in negotiation.

Canada distinguishes most claims into one of two categories: comprehensive and specific. Comprehensive claims are generally based on unextinguished aboriginal title and normally arise in areas of the country where no treaty exists between First Nations and the Crown. Specific claims generally involve a breach of treaty obligations or a situation where the Crown's lawful obligations have been otherwise unfulfilled, such as a breach of an agreement or a dispute over obligations deriving from the *Indian Act*.

These latter claims are the focus of the ICC's work. Although the Commission has no power to accept or force acceptance of a claim rejected by Canada, it does have the power to thoroughly review the claim and the reasons for its rejection with the claimant and the government within the forum of an inquiry. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, gather information, and subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant, it may recommend to the Minister of Indian Affairs and Northern Development that a claim be accepted.

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[8] ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 11.

[9] Jane Stewart, Minister of Indian Affairs and Northern Development, to Commissioners James Prentice and Roger Augustine, December 18, 1997, as reported in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 371.

In addition to conducting inquiries, the Commission is authorized to provide mediation services at the request of parties in negotiation. From its inception, the Commission has interpreted its mandate broadly, as it has been encouraged to do, and has vigorously sought to advance mediation as an alternative to the courts. In the interests of helping First Nations and Canada negotiate agreements that reconcile their competing interests in a fair, expeditious, and efficient manner, the Commission offers the parties a broad range of mediation services tailored to meet their particular goals.

PART II

A BRIEF HISTORY OF THE CLAIM

The present report relates only to the Commission's fulfilment of its mediation mandate. It should be noted, however, that, as a result of the previous inquiry, the Commission had the benefit of historical records and detailed legal submissions from the parties setting out the basis of the claim. This knowledge was relied upon only to the extent that background information may have been required by Commissioners or Commission staff. Accordingly, the Commission makes no findings of fact in this report.

The historical context of this claim has been described at length in the Commission's February 1997 report, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry*.[10] Only a brief summary will be found here.

Chief Kahkewistahaw (or "He Who Flies Around") was one of 13 chiefs who signed Treaty 4 at Fort Qu'Appelle on September 15, 1874, representing the ceding of Indian rights over a 75,000-square-mile area of the most fertile lands in southern Saskatchewan. In August 1881, John C. Nelson, Dominion Land Surveyor, surveyed a reserve for the Band south of the Qu'Appelle River between Crooked and Round Lakes (Indian Reserve [IR] 72).

The Band gradually began to succeed at farming their lands over the next few years, evolving from almost complete dependence on government assistance and rations to a relatively self-sustaining mixed farming operation, which included growing wheat and raising livestock. Both dairy and beef cattle herds became a prominent part of the Band's overall agricultural efforts, markets for which were more readily available than for their grain.

Raising livestock required good hay lands, something that Kahkewistahaw had in abundance on the southern part of its reserve. The sloughs at the south end of the reserve not only were sufficient for the Band's hay needs but also yielded an excess that could be sold on the market for profit even in dry years. Hay production increased from 85 tons in 1882 to 350 tons by 1895. These very fertile and profitable lands were ultimately targeted for surrender.

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[10] Full documentation of the details summarized here is found in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, 1997), reported (1998) 8 ICCP 3.

The 1905 appointment of Frank Oliver as Minister of the Interior and Superintendent General of Indian Affairs came as rapid economic development was becoming a governmental priority. Oliver, a former editorial writer for the Edmonton *Bulletin*, had long campaigned to free up reserve land for settlement. Of note was Oliver's public expression of his view: "[O]f course the interests of the people must come first and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for."[11] This attitude quickly pervaded the department and was reflected in subsequent government policy and legislation aimed at reducing in size or eliminating Indian reserves. For example, a 1906 amendment to the *Indian Act*[12] increased to 50 per cent the proceeds of a surrender and sale that could be distributed immediately to band members. Previous to this amendment, the per capita distribution had been limited to 10 per cent.

These factors combined to give the federal government the result it wanted: the surrender in 1907 of over 90,000 acres from Kahkewistahaw and two other local reserves. The Kahkewistahaw surrender finally came about after many locally based surrender requests and petitions (1885, 1886, 1891, 1899, 1902, and 1904), as well as two surrender meetings presided over by Inspector of Indian Agencies William Graham. A cash distribution of $94 per person was made immediately following the second, and successful, surrender vote. When it was over, Kahkewistahaw IR 72 had surrendered 33,281 acres of land to the Crown for sale out of the over 46,720 acres it possessed as a result of Treaty 4. This surrender represented more than 70 per cent of the band's original treaty lands. Of the 13,439 acres left, most of it was significantly inferior to the lands surrendered, in both percentage and quality of arable land.

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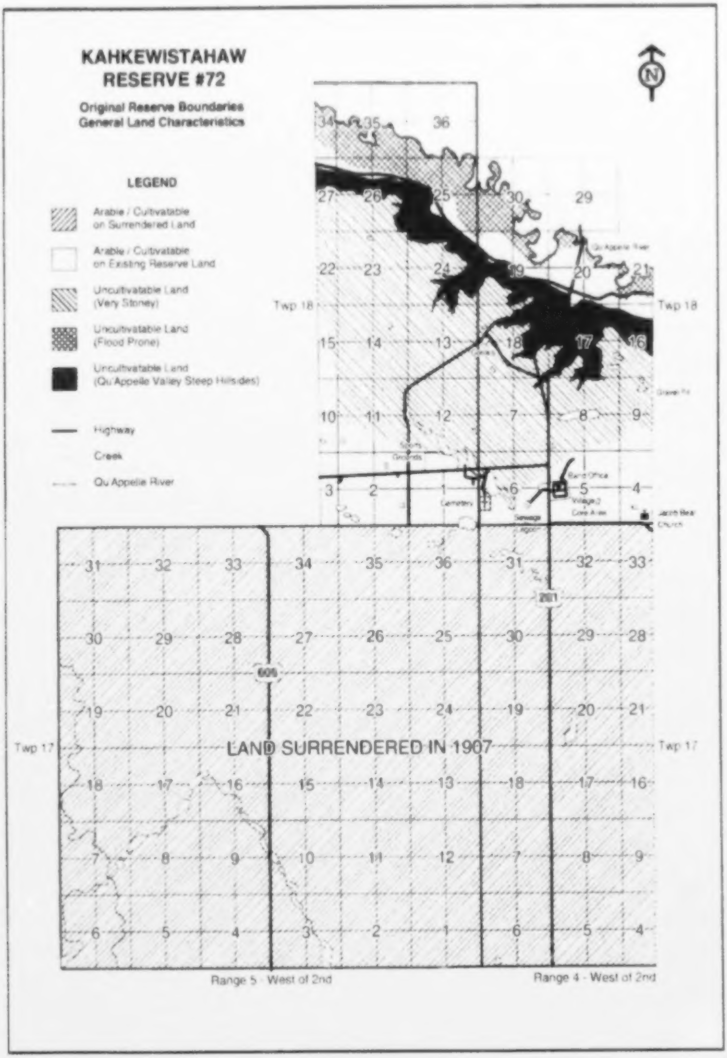
[11] Canada, House of Commons, *Debates* (March 30, 1906), 947–50, as noted in ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 40.

[12] SC 1906, c. 20, s. 1 (amending s. 70 of the Act). Royal Assent was given on July 13, 1906. This was not the only *Indian Act* amendment promoted by Oliver to reduce in size or eliminate Indian reserves. In 1911, two others were passed, together referred to by Indians as the "Oliver Act." The first allowed public authorities to expropriate reserve land without the need of a surrender. Any company, municipality, or other authority with statutory expropriation power was enabled to expropriate reserve lands without Governor in Council authorization as long as it was for the purpose of public works. The second allowed a judge to make a court order that a reserve within or adjoining a municipality of a certain size be moved if it was "expedient" to do so. There was no need for band consent or surrender before the entire reserve could be moved. SC 1911, c. 14, ss. 1 and 2, respectively.


KAHKEWISTAHAW
RESERVE #72
Original Reserve Boundaries
General Land Characteristics
LEGEND
Arable / Cultivatable on Surrendered Land
Arable / Cultivatable on Existing Reserve Land
Uncultivatable Land (Very Stoney)
Uncultivatable Land (Flood Prone)
Uncultivatable Land (Qu'Appelle Valley Steep Hillsides)
Highway
Creek
Qu'Appelle River
N
Twp 18
Twp 17
Qu'Appelle River
Sports Grounds
Cemetery
Band Office
Village 2 Core Area
Sewage Lagoon
Jacob Bear Church
Gravel Pit
201
605
LAND SURRENDERED IN 1907
Range 5 - West of 2nd
Range 4 - West of 2nd

The surrender and proposed sale of the land were approved by Order in Council on March 4, 1907, and the vast majority of the land was sold in two sales held on November 25, 1908, and June 15, 1910. The small amount of remaining surrendered land was disposed of following the end of the First World War through the Soldier Settlement Board.

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

Following the Minister of Indian Affairs' acceptance of the First Nation's surrender claim in December 1997, substantive negotiations began in the fall of 1998. The central issues were the amount of compensation offered by Canada for the value of the land improperly surrendered and the loss of this land's use from 1907 to the present day.

The Commission's role in the process normally would have ended once the inquiry was completed and the claim of the First Nation accepted for negotiation by Canada. Early in the negotiation process, however, the Commission received a letter written jointly by the Kahkewistahaw First Nation and the Government of Canada, asking if the Commission would act as facilitator for the negotiations. The Commission agreed, and Ralph Brant, Director of Mediation, assumed responsibility.

Facilitation focused almost entirely on matters relating to process. The Commission's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish mutually acceptable agendas, venues, and times for the meetings. At the request of the parties, the ICC was also responsible for mediating disputes, assisting the parties in arranging for further mediation, and acting as a coordinator for the various studies undertaken by the parties to support negotiations.

Although the nature of the negotiations is confidential to the negotiating parties and cannot be disclosed by the Commission, it can be stated that Kahkewistahaw First Nation and representatives of the Department of Indian Affairs and Northern Development worked to establish negotiating principles and a guiding protocol agreement, and these helped them to arrive at a mutually acceptable resolution of the First Nation's claim.

Progress in the negotiations was slow but steady over the next few years. As negotiations proceeded, loss-of-use studies and land appraisals were conducted to provide the information required for a claim valuation and subsequent negotiations. Independent consultants assessed the losses of use from traditional activities, agriculture, forestry, and mining to estimate the net economic losses to the First Nation as a result of the 1907 surrender. In addition, two independent land appraisals were completed.

Up to this point, the role of the ICC in claims negotiations generally had been limited to facilitating the negotiations. With the Kahkewistahaw claim, however, the Commission, at the request of the negotiation table, took on the added responsibility of acting as study coordinator. This enhanced role required the Commission to monitor the progress and completion of the studies, coordinate meetings, help eliminate duplications and inconsistencies between studies, provide a coordinated summary of all the studies, and facilitate communications between the consultants and the negotiating teams made up of representatives from the First Nation and Canada. The Commission successfully completed this undertaking, both for the studies undertaken jointly by Canada and the Kahkewistahaw First Nation as well as for several additional studies undertaken solely by the First Nation, including a Special Economic Advantage and Disturbance Cost Study, an Acquisition Costs and Reserve Creation Costs Study, and a Present Value Study. Independent of this process, the Band also completed land sales and trust account research.

As is the case with most claim negotiations, the negotiating parties were frustrated by delays. There were delays in getting the research and loss-of-use studies completed. Other delays were caused by staff turnovers at the Department of Indian Affairs and Northern Development and the Department of Justice. At times, negotiations were virtually at a standstill.

After intense and elaborate discussions, however, Canada made an offer to settle.[13] The First Nation ultimately accepted, and a Settlement Agreement was finalized following the exchange of much correspondence, many conference calls, meetings, and revised drafts.

On November 25, 2002, the Kahkewistahaw First Nation successfully ratified the proposed settlement of $94.65 million as compensation for the surrender and loss of use of 33,248 acres of reserve land taken in 1907.

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[13] A.J. Gross, Chief Federal Negotiator, Department of Indian Affairs and Northern Development, Specific Claims Directorate, to Chief Louis Taypotat, Kahkewistahaw First Nation, January 14, 2002 (ICC file 2107-23-01).

PART IV

CONCLUSION

The Kahkewistahaw First Nation claim, like most specific land claims outstanding in Canada, took years to resolve, in this case over 13 years. Although the Commission was involved as facilitator/mediator, it had no authority to force a settlement or to impose one. The credit for settling this claim belongs to the parties. However, the outcome of the negotiations indicates the Commission's potential to advance the settlement of claims. For eight years, efforts by the First Nation to have its claim validated and settled were unsuccessful. The Commission's inquiry process was able to produce movement to the extent that the First Nation and Canada agreed on the value of having the Commission continue to be involved in the negotiation.

The Commission's continued presence in the negotiation adds value to a process that is plagued by the inability of the parties at the table to maintain consistency in negotiations. This inability is caused in part by high turnover rates in negotiators and legal counsel. The Commission's mediation service not only helps the parties keep the focus and momentum in the negotiations, but can also serve as an essential "corporate memory" at the table.

Much to the parties' credit, however, is the fact that they were able to work together to complete land appraisals and loss-of-use studies. At many past negotiation tables, studies undertaken independently by each party did not lead to a better understanding or greater likelihood of a final agreement. The Commission's role as study coordinator in this process proved to be extremely helpful in moving the negotiation forward.

FOR THE INDIAN CLAIMS COMMISSION

Phil Fontaine
Chief Commissioner

Dated this 21st day of January, 2003.

INDIAN CLAIMS COMMISSION

ALEXIS FIRST NATION INQUIRY
TRANSALTA UTILITIES
RIGHTS OF WAY CLAIM

PANEL

Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Sheila G. Purdy

COUNSEL

For the Alexis First Nation
Jerome N. Slavik / Trina Kondro

For the Government of Canada
Carole Vary / Kevin B. McNeil

To the Indian Claims Commission
Kathleen N. Lickers / Candice Metallic

MARCH 2003

CONTENTS

EXECUTIVE SUMMARY

PART I ***INTRODUCTION*** 33
Background to the Inquiry 33
Map 1: Claim Area Map 35
Mandate of the Commission 41

PART II ***HISTORICAL BACKGROUND*** 43
Treaty 6 and the Creation of IR 133 43
Map 2: Alexis IR 133 44
The 1959 Distribution Line 45
The 1967 Distribution Line Extension 54
The 1969 Transmission Line 61
  The Policy Context 61
  Negotiation of the Right of Way for the 1969 Transmission Line 67
  Indian Affairs Reconsiders Its Policy for Utility Rights of Way 79
  The Transition Period 86
  The New Policy 88
Introduction of Property Assessment and Taxes on IR 133 93

PART III ***ISSUES*** 95

PART IV ***ANALYSIS*** 97
Vulnerability of the Alexis Band 97
Issue 1: Duty of the Crown in Granting Rights of Way 102
  Issue 1(a): Duty to Obtain Compensation 102
    The 1959 Distribution Line 102
    The 1967 Distribution Line Extension 105
  The Fiduciary Relationship and the 1969 Transmission Line 109
  Issue 1(b): Duty to Advise in Negotiations 114
  Issue 1(c): Duty to Obtain Independent Appraisal 119

Issue 2: Duty to Obtain Annual Payment 121
  Issue 2(a): Was the 1969 Lump Sum Payment Exploitative? 121
    Background 121
    Knowledge of DIAND Officials 124
    DIAND's Policy Review 127
    Findings 129
  Taxation Provisions and Minimal Impairment 133
  Issue 2(b): Duty to Obtain Assessment of Taxes 134
  Issue 2(c) and (d): Duty to Obtain Annual Revenues and Minimally Impair 137
  Issue 2(e): Duty to Assist with Taxation Bylaws 141
  Issue 2(f): Duty to Obtain Informed Consent 144

PART V ***CONCLUSIONS AND RECOMMENDATION*** 150

APPENDICES

A Interim Ruling: Alexis First Nation Inquiry – TransAlta Utilities Rights of Way Claim, Ruling on Government of Canada Objections, April 27, 2000 153
B Rejection Letter – W.J.R. Austin, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Francis Alexis, Alexis First Nation, January 29, 2001 173
C Interim Ruling: Kathleen N. Lickers, Commission Counsel, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, DIAND Legal Services, March 9, 2001 181
D Alexis First Nation Inquiry – TransAlta Utilities Rights of Way Claim 185

EXECUTIVE SUMMARY

BACKGROUND

On August 21, 1877, the ancestors of the present-day Alexis First Nation executed an adhesion to Treaty 6. Pursuant to the treaty, Indian Reserve (IR) 133 was set aside for the Alexis Band on the north shore of Lac Ste Anne, approximately 60 kilometres northwest of Edmonton, Alberta. The reserve covered 23 square miles.

The specific claim of the Alexis First Nation concerns the federal Crown's grants of three rights of way to Calgary Power on Alexis IR 133 during the 1950s and 1960s. The first right of way, granted in 1959, concerned an electrical distribution line that served the Alexis Day School on the reserve. The Band was promised jobs to clear the land but received no compensation for the right of way. The second distribution line right of way, granted in 1967, extended from the 1959 line south to a location outside the reserve and was initially intended to serve cottages at West Cove on the south shore of Lac Ste Anne. It also brought electricity to houses on the Alexis reserve. The Band received compensation for the right of way in the amount of $195. Both the 1959 and 1967 distribution line permits were granted pursuant to section 28(2) of the *Indian Act*, and both permits required Band Council consent.

In 1969, Calgary Power received a permit from the Crown for a right of way to build a high-voltage transmission line across the reserve, serving only communities outside the reserve. It was approved pursuant to the corporation's enabling legislation and the expropriation provisions in section 35 of the *Indian Act*. The Band was not required to provide its consent but did pass a Band Council Resolution (BCR) agreeing to the terms of the transaction. The Band received a one-time lump sum payment of $4,296 in compensation, and band members were promised jobs clearing the right of way.

The specific claim alleges that Canada failed to protect the interests of the Alexis Band in each of the three transactions, but the main focus of the claim is the 1969 transmission line. In particular, the claim asserts that Canada breached its fiduciary obligations when it failed to obtain annual payments for the Band in the 1969 agreement, failed to advise the Band that, pursuant to the agreement, it could levy taxes on Calgary Power, and failed to assist the Band to realize that tax revenue. The essence of the claim, according to the Alexis First Nation, is that Canada failed to achieve fair and reasonable value for Calgary Power's use of reserve land under the 1969 agreement, resulting in a continuing loss of revenue until the late 1990s, when the First Nation began collecting tax revenue from the corporation.

The specific claim was launched in 1995 and formally rejected by the government in January 2001 following a decision in April 2000 by the Indian Claims Commission (ICC), on application of the First Nation, to deem the claim rejected and commence an inquiry.

FINDINGS

VULNERABILITY

We find, as a question of fact, that the Alexis Band in the 1950s and 1960s was vulnerable and dependent on the Department of Indian Affairs and Northern Development (DIAND) to represent the Band's interests in the negotiations that ensued with Calgary Power for the three rights of way, in particular the negotiations for the transmission line. The harsh economic times and unemployment on the reserve, coupled with a lack of education, little knowledge of the English language, and a relatively poor relationship with the Indian Agents, created an environment in which the Band's leadership was at an obvious disadvantage in face-to-face negotiations with representatives of a major power corporation. This finding is supported by the community testimony and the government's own documents, in particular a 1966 report advising that the Alexis Band would require considerable guidance for some time.

COMPENSATION FOR THE 1959 AND 1967 DISTRIBUTION LINES

The 1959 Line

The First Nation contends that the failure to obtain any compensation for the right of way to bring the1959 distribution line to the Alexis Day School was a breach of the Band's right under treaty not to have any part of its reserve land alienated for the purpose of satisfying another treaty right, the right to education, without receiving some compensation. Unfortunately, this argument was advanced without the requisite analysis of the rights in question, making it impossible for us to agree or disagree with the First Nation's position that the Crown had breached the Band's treaty rights. Further, the First Nation was not aware of any legal precedents to assist its argument that, when electricity was brought to the school at the Crown's expense solely for the benefit of the First Nation, the Crown ought to have provided compensation in addition, since the line necessarily encroached on reserve land.

There was also no fiduciary obligation to obtain compensation for the Band. Notwithstanding the Band's vulnerability, the Band Council understood that the line would bring electricity to the school, it was perceived by the people to be a benefit, the Band Council consented through a BCR, and it made good sense and was in the Band's best interest to introduce electricity to a community that had been without it.

The 1967 Line

We infer from the evidence that, although the 1967 distribution line extension was originally planned to service the West Cove cottages off the reserve, its collateral purpose was to service houses on the reserve in the vicinity of the right of way. The Alexis Band was paid a modest amount of compensation. Without any evidence to suggest that the amount of $195 was patently unreasonable in circumstances in which the Band also benefited from access to electricity, we are unable to agree with the First Nation that Canada owed a duty to obtain better terms for the Band.

THE 1969 TRANSMISSION LINE

Justification for Expropriation of Reserve Land

The First Nation raised the issue of a lack of valid public purpose to justify an expropriation of reserve land for the first time in its written submissions. As a result, Canada had no opportunity to bring forward additional evidence, and the Commission did not consider this question. The analysis proceeded on the assumption, therefore, that the 1969 transmission line permit met the technical requirements of the *Indian Act*.

The Fiduciary Relationship

The issues and arguments regarding the fiduciary duties owed by the Crown to the First Nation in the context of an expropriation are the main focus of this claim.

Both parties agree that certain fiduciary duties arose during the period when the Crown was negotiating a final agreement with Calgary Power to run a transmission line across the Alexis reserve. They disagree, however, on the nature and scope of those duties.

What distinguishes an expropriation of reserve land from a surrender is the important fact that in an expropriation, unlike a surrender, the band does not make the ultimate decision. The sole discretion to approve an expropriation lies with the Crown, who must balance the best interests of a band, including the preservation of its reserve land, with the public purpose of providing adequate electrical services to the general population. For this reason, we find that the duty applicable in a surrender – namely, the Crown's duty to prevent an exploitative arrangement, as enunciated in the *Apsassin* case, does not address adequately the circumstances of an expropriation. Instead, we agree with the First Nation that the fiduciary duty goes beyond the prevention of exploitation where the Crown exercises complete power over the decision. We agree that, although the general duty to prevent exploitation must be examined, the more appropriate question to ask – one that was applied in *Apsassin* to the Crown's unilateral transfer of mineral rights on the surrendered reserve – is whether a reasonable person of ordinary prudence managing his own affairs would agree to the arrangement.

We also agree with Canada that the Crown has a duty, as expressed in the recent *Osoyoos* case, to minimally impair the interest of a band in an expropriation, but we recognize that the Court in *Osoyoos* was not asked to address the scope of the Crown's fiduciary obligations in negotiating a compensation package on behalf of a band. We consider that the "minimal impairment" test means that the band's legal interest in the land is to be affected as little as possible when reserve land is expropriated, but that this test represents only one of several duties that may arise.

Duty to Advise the Band

The evidence indicates that Calgary Power likely negotiated the terms that were contained in the 1968 BCR directly with the Band Council without the knowledge of or input from Indian Affairs. Once it learned that the Band had agreed to a right of way for a transmission line, however, the Crown ought to have realized that the Band, given its vulnerability and dependence in those years, was at a disadvantage in negotiating directly with Calgary Power. The Crown, therefore, had a duty to scrutinize the deal, in particular by finding out the cost to Calgary Power of rerouting the line outside the reserve, and it had a duty to share this information with the Band. On the evidence before us, the Crown's agents did not provide adequate information to the Band regarding its options during the 15 months between the signing of the BCR and the government's final approval of the right of way.

Duty to Obtain Independent Appraisal

The Crown obtained information on land values in the adjacent area from a DIAND official. Although the Crown did not obtain an independent appraisal, the per acre value of $100 for the Alexis right of way appeared to be well within the range of land prices at the time. Recent evidence that the utility corporation paid $95 per acre in 1969 for an easement over non-reserve, cultivated land adjacent to the reserve corroborates the Crown's earlier assessment. The fact that the Crown did not retain an independent appraisal is not tantamount to a breach of fiduciary duty in these circumstances.

Was the 1969 Lump Sum Payment Exploitative?

We are persuaded by the exchange of correspondence among DIAND officials directly responsible for recommending that the 1969 transaction be approved on the basis of a one-time lump sum payment that they knew or ought to have known that this transaction was unjust and not in the Band's best interest. We find that certain departmental officials acted conscientiously in trying to improve the terms for the Band but that ultimately the government approved a transaction in which the terms of compensation were known to be inadequate.

The departmental policy on compensation for expropriations on reserve land was under review at the time but, regardless of which policy was in place, it cannot shield the Crown from responsibility when it concerns the Crown's duty to First Nations. The Crown also had 15 months within which it might have revisited the terms of the agreement in an attempt to get a deal that would provide annual payments to the Band, but it made no serious efforts to do so. The Band Council was kept in the dark about its options and continued to be motivated by the prospect of jobs to clear the right of way.

The Crown had a duty to prevent an exploitative transaction but it failed to do so. Moreover, we find that, in applying the *Apsassin* test of the reasonable person managing his own affairs, the Crown would not have made this deal for itself, given its awareness that a one-time lump sum arrangement was inadequate compensation for a long-term interest. Instead, the Crown was willing to acquiesce to the commercial interests of Calgary Power and put the Alexis Band's interests second.

Duty with Respect to Taxation and Minimal Impairment

Although the historical record does not provide any evidence that the standard practice in adjacent municipalities at the time was to obtain an annual charge or fee from Calgary Power, the First Nation obtained reliable evidence from a consultant in preparing its claim showing that information on assessments and taxes for off-reserve locations in the area were part of the public record, and that a portion of the same transmission line on land that became part of the reserve in 1996 had been subject to taxation since 1968 as part of Lac Ste Anne County's assessment. Given our finding that compensation in the form of annual payments with periodic reviews was recognized by the Crown as necessary to provide adequate compensation to bands, it became part of the Crown's duty to investigate all possible alternatives, including taxes or grants in lieu of taxes. This information was readily available, but, by not obtaining and discussing this option with the Band, the Crown breached its fiduciary duty.

The Band was not told that a taxation clause permitting it to levy taxes on Calgary Power had been written into the agreement between the Crown and the company. The Crown knew, however, that the *Indian Act* prohibited the Band from exercising this power until, in the opinion of the Governor in Council, it had reached "an advanced stage of development." The evidence is persuasive that the Band Council did not have the capacity in 1969 to implement a taxation bylaw, nor did they understand the concept of taxing third parties.

We agree with Canada that the Crown met the duty of minimal impairment to the Band's interest in the reserve lands by inserting the taxation clause into the agreement, even though it could not be exercised. What we disagree with is Canada's contention that no fiduciary duty existed to advise the Band of its taxation power or to take any steps to implement it. We find that, given the inadequacy of the lump sum compensation, the Crown had a fiduciary duty to explain to the Band that it had this authority and to take remedial action that would better serve the Band's interests. The only viable way to do this once the agreement was finalized was to help the Band to implement its taxation authority and, if necessary, to collect the tax equivalencies on its behalf.

Duty to Assist with Taxation Bylaw after 1969

According to the *Apsassin* decision, the fiduciary duty of the Crown is a continuing duty that does not end at the date on which the land is alienated. The Crown could have made efforts in the years following the approval of the transmission line right of way to bring the Alexis agreement into line with its new policy on compensation, but it chose not to disturb the agreement. Having recognized the unfairness of providing a lump sum payment in cases of expropriation before the Alexis deal was given final approval, the Crown had an ongoing duty, as well as the ability, to correct the problem and recoup some of the losses suffered by the Band over time.

We agree with Canada that, in principle, the Crown is not expected to start implementing all sorts of bylaws on behalf of First Nations, but in this case the Crown had a duty to take steps to use the Band's taxation authority to obtain tax revenues for it. The *Indian Act* prohibition was a matter totally within the Crown's discretion. It cannot and should not be used as a defence for inaction when the Crown had an ongoing duty in the three decades following the approval to right a wrong.

Duty to Obtain Informed Consent

The Crown had no statutory obligation to obtain the Band's consent to the transmission line right of way. Nevertheless, to its credit, the Crown had established a practice of seeking band consent prior to requesting final approval of the Crown's agreement with the expropriating authority. Further, we find that the Band Council would have had an honest belief that its consent was required, given previous encounters with Calgary Power. In these circumstances, the Crown's fiduciary duties included the duty to obtain consent to the right of way and to ensure that it was an informed consent.

There are two pieces of information that, in our view, are critical to a finding that the Band gave its informed consent. The first item, which was never adequately dealt with by the Crown, was the apparent discrepancy between the land to be compensated for and the significantly greater area that was to be cleared for safety reasons but not compensated for. Had officials been actively counselling the Band and pointed out this discrepancy, the Band Council may well have questioned the level of compensation.

The second important piece of information not shared with the Band was the Crown's accumulated knowledge that annual rents and renewal provisions were considered to be fairer than lump sum payments. We find that the initial Band Council Resolution did not represent the informed consent of the Band, given the likely absence of Crown agents during the initial discussions with Calgary Power, the subsequent passage of time before final approval, and the lack of any serious attempt on the part of Crown agents to discuss with the Band the possibility of obtaining better terms. The evidence that the

Band became indecisive about its wishes after signing the BCR, coupled with the lack of evidence that the Crown followed up with the Band to deal with its indecision, persuades us that the Band did not have sufficient knowledge to give its informed consent during the 15 months before final approval.

CONCLUSIONS AND RECOMMENDATION

We conclude that the Crown breached a number of fiduciary duties, in particular the duty to prevent an improvident or exploitative arrangement, given the Crown's knowledge that a one-time lump sum payment for a long-term interest on reserve land, for which the Band received no ongoing benefit, was inadequate and unjust. We also conclude that, in applying the *Apsassin* test of the reasonable person managing his own affairs, the Crown would not have made such a deal for itself in 1969. Having done so on behalf of the Alexis Band, however, the Crown had a further duty to assist the Band to implement its taxation authority, if necessary collecting the revenues on the Band's behalf, as the most viable means of recouping some of the losses under the expropriation agreement.

We recommend therefore that the Alexis First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

In 1959, Calgary Power Ltd. (Calgary Power) – the corporate predecessor to present-day TransAlta Utilities Corporation (TransAlta) – installed an electrical distribution line to provide power to the new Alexis Indian Day School situated in the southeast quarter of section 11, township 55, range 4, west of the 5th meridian (SE 11-55-4-W5M) within the Alexis Band's Indian Reserve (IR) 133.[1] The reserve, located roughly 60 kilometres northwest of Edmonton, was not served by electrical power before that time. A 30-foot right of way was specified for this line but its precise area is unclear because it was never surveyed. It is located a short distance north of Lac Ste Anne, which forms the natural southern boundary of the reserve. The line extends due west from the east boundary of the reserve for a distance of 1.4 kilometres (⅞ mile) before angling southwest for another 1.6 kilometres (one mile) to the school site. Under the terms of the permit between Canada and Calgary Power, the company was empowered under section 28(2) of the *Indian Act* to exercise its rights within the right of way[2] "for such period of time as the said right-of-way is required for the purpose of an electric power transmission line." The Band received no payment under the permit, although it was agreed that band members would be paid to clear the right of way.

Eight years later, in 1967, Calgary Power ran a branch line off the 1959 distribution line, primarily to serve cottages at West Cove on the south shore of Lac Ste Anne. Until this time, the Day School had represented the only building on IR 133 serviced by electrical power, but with the arrival of Canada's Centennial year, a broader program of electrification on the reserve commenced, delivered by means of the 1959 and 1967 distribution lines.[3] The 1967 line extended from a point within the reserve on the earlier line in a southeasterly direction to the north shore of Lac Ste Anne, then along the shore to a narrowing in the lake, referred to by members of the First Nation as The Narrow or The Narrows; at that point, the line paralleled the nearby roadway and bridge across The Narrow to the south shore. Comprising a total surveyed area of 1.14 acres, the 30-foot right of way[4] for the 1967 distribution line included some combination of poles and guy wires totalling 13, for which the Band received one-time compensation of $195 at the rate of $15 per pole and guy wire. As with the 1959 permit, the rights granted to Calgary Power under section 28(2) of the *Indian Act* were "for such period of time as the said right of way is required for the purpose of an electric power transmission line."

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[1] Depending on the historical context, the Alexis First Nation will be referred to alternatively as the "Alexis Band," the "Band," or the "First Nation."

[2] The terms "right of way" and "easement" are used interchangeably in the historical documents.

Finally, in 1969, Calgary Power installed a third line across the Alexis Band's reserve to convey electricity from the company's plant at Wabamun, Alberta, to Slave Lake, Alberta. This line differed from the earlier two because, as a transmission rather than a distribution line, its sole purpose was to transfer power *across* the reserve rather than to distribute electricity to buildings and other facilities on the reserve or in its immediate vicinity. It also differed in that, rather than being granted by virtue of a permit under section 28(2) of the *Indian Act*, the right of way was authorized under expropriation provisions in both the company's enabling legislation as well as the expropriation provisions in section 35 of the *Indian Act*. The Band received a single lump sum payment of $4,296 in compensation at the rate of $100 per acre for the 150-foot right of way "for such period as the said lands are required for a right-of-way for power transmission line purposes," and band members were paid at the rate of $300 per acre to clear the required land.

The location of IR 133 is found on Map 1 and the position of the three power lines is depicted on Map 2 in this report (see pages 35 and 44).

In a statement of claim submitted to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) on October 4, 1995, with a request that the claim be "fast tracked,"[5] the Alexis First Nation contended that Canada failed to protect the interests of the

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[3] Indian Claims Commission (ICC) Transcript, December 5, 2001 (ICC Exhibit 11, p. 76, Howard Mustus).

[4] "Sketch Plan Showing Proposed Right-of-Way of Power Line for Calgary Power Ltd.," January 11, 1967 (ICC Exhibit 10, p. 186).

[5] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West, DIAND, October 4, 1995.

Map 1

St. Albert
EDMONTON

"vulnerable and dependent" Alexis people in each of the three transactions. With regard to the 1969 transmission line, the First Nation contended that DIAND breached a number of fiduciary obligations and the First Nation objected to Canada's perceived failure to insist on annual payments for the right of way granted to Calgary Power. The result of these failures by Canada, according to the First Nation, was that "Alexis failed to achieve fair and reasonable value for use of their Indian Reserve by [Calgary Power]," and that it has "lost, and continues to lose, substantial revenues which, in the ordinary course of cautious and prudent conduct and advice by a reasonable and informed trustee, would have, or ought to have, been obtained for a beneficiary in similar circumstances."[6]

At about the same time, the First Nation approached TransAlta with a view to levying annual charges against the company under a term of the 1969 permit requiring Calgary Power to "pay all charges, taxes, rates, and assessments whatsoever payable by the Grantee [Calgary Power] or any occupant of the right of way which shall, during the continuance of the rights hereby granted, be due and payable or be expressed to be due and payable in respect of the works or use by the Grantee of the right-of-way." In a Band Council Resolution (BCR) dated September 19, 1995, the First Nation retroactively claimed charges of $4,000 per year from 1970 to 1980, $5,000 per year from 1980 to 1990, and $6,000 per year from 1990 to 2000. It further directed its counsel to take "all necessary steps against Canada and TransAlta Utilities [to] ensure collection of the annual charges."[7]

On October 23, 1995, however, Wolfgang Janke, TransAlta's vice-president of customer services, replied that, under the terms of the 1969 permit, it was not open to the First Nation to impose new charges in the manner proposed. Janke indicated the company's willingness to consider paying taxes or making payments in lieu of taxes, but he rejected any suggestion that the company would make any such payments on a retroactive basis.[8] Counsel for the First Nation forwarded Janke's letter to Manfred Klein of Specific Claims West (SCW) on November 29, 1995, with a request that it be added to the First Nation's October 1995 statement of claim. Counsel contended that, because the First Nation had little or no prospect of recovering its losses from TransAlta, it would be seeking full compensation from DIAND.[9]

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[6] Alexis First Nation, "Statement of Claim re Breach of Crown's Fiduciary and Statutory Duty in Granting Right-of-Way to Calgary Power for Electrical Power Transmission Lines on Alexis Indian Reserve #133," October 1995, pp. 9–10 (ICC Exhibit 1).

[7] Alexis First Nation, Band Council Resolution 95-96/133-3-6-20, September 19, 1995 (ICC Exhibit 1, pp. 38–39).

[8] Wolfgang Janke, Vice-President, Customer Services, TransAlta Utilities Corporation, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, October 23, 1995 (ICC Exhibit 2, pp. 3–4).

Following the release of the Supreme Court of Canada's decision in the *Apsassin* case,[10] Alexis First Nation on April 23, 1996, tendered a further supplement to its earlier submissions. Counsel urged federal negotiator Al Gross of Specific Claims West to conclude, based on *Apsassin*, that "DIAND must act as a reasonable, prudent, and well informed person in similar circumstances to ensure any land dealings were on terms in the Indians' best interest." Counsel further contended that, given "the permanent or very long term loss of their land," the Alexis people should have been compensated not only for the installation of pylons and associated clearing costs but also on an ongoing basis for the loss of use of the property involved; moreover, they should have been advised at an early date that they could obtain further annual payments in the form of taxes or payments in lieu of taxes. Counsel argued that Canada had further failed to meet its "continuing obligation and opportunity throughout the 27-year duration of the easement to correct this mistake or inadvertence."[11]

In the meantime, Specific Claims West undertook confirming research regarding the First Nation's submission and prepared an historical report dated April 29, 1996 (the SCW Report) in preparation for a legal review of the claim by the Department of Justice.[12] This report was forwarded to counsel for the First Nation for "review and analysis," and on August 11, 1996, counsel advised Canada that, in his opinion, the report confirmed Indian Affairs' breach of its "lawful and fiduciary obligation to the First Nation." Given his view that the compensation owed to the First Nation amounted to less than $500,000, he reiterated the First Nation's request that the claim be "fast tracked."[13]

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[9] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Manfred Klein, Specific Claims West, DIAND, November 29, 1995 (ICC Exhibit 2, p. 2).

[10] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344. This decision is commonly referred to as the *Apsassin* case.

[11] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Al Gross, federal negotiator, Specific Claims West, DIAND, April 23, 1996 (ICC Exhibit 3, pp. 1–3).

[12] "Alexis Powerline Easement Claim," prepared at the request of Specific Claims West, April 29, 1996 (ICC Exhibit 4). The source of this report is unclear. The author refers to himself or herself as "the Consultant," and the report itself states that it was "prepared at the request of Specific Claims West and does not necessarily reflect the views of the Government of Canada." However, in a letter dated December 9, 1996, in response to the First Nation's request for funding to respond to the report, Donna Reid-Daly of Indian Affairs referred to the document as "the historical report prepared by the Specific Claims Branch concerning the Alexis Indian Band's TAU [TransAlta Utilities] Right-of-Way claim": Donna Reid-Daly, Research Funding Division, Claims and Indian Government, DIAND, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, December 9, 1996 (ICC file 2108-1-2, vol. 1).

In succeeding months, however, the review of the claim by Canada was repeatedly delayed. After being informed that there would be a "delay of an undetermined amount of time" in processing the claim, counsel for the First Nation on August 21, 1997, submitted his first request to the Indian Claims Commission (the Commission) that it deem Canada to have rejected the claim so that an inquiry could be commenced. In December 1997, Canada contracted with Public History Inc. (PHI) to undertake and complete additional research by June 15, 1998.

In the meantime, to protect its legal position, the First Nation commenced an action in the Federal Court of Canada, Trial Division, on June 10, 1998, having previously informed DIAND that, should the claim be validated, the First Nation would suspend the litigation. Nevertheless, although PHI's research had been nearing completion, Canada elected to suspend further review of the claim under the Specific Claims Policy while the matter remained "active" before the courts. Preparation of the research report did not resume until March 1999 when, after Canada informed the First Nation of its reasons for suspending work on the file, counsel for the First Nation obtained an order of the Federal Court placing the litigation in abeyance. Even after this step was taken, however, Canada's progress on the file continued to lag.

Finally, after repeated requests by the First Nation to Canada to disclose the status of the research report and to the Commission to request that the claim be deemed to have been rejected, the Commission on October 27, 1999, accepted the First Nation's request for an inquiry. On January 4, 2000, Paul Girard, Director General of the Specific Claims Branch, informed the Commission that "the claim has not yet been rejected by the Specific Claims process, and therefore, the Indian Claims Commission is not in a position to review the file." He added that PHI's research report had been completed and, following review by the First Nation, it would be forwarded to the Department of Justice; only after review by that department would DIAND be in a position to provide the First Nation with Canada's preliminary position on the claim.[14] In subsequent correspondence dated February 7, 2000, to the

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[13] Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, to Al Gross, federal negotiator, Specific Claims West, DIAND; Michel Roy, Director General, Specific Claims Branch, DIAND; and Karen Allen, Director of Research, DIAND, August 11, 1996 (ICC Exhibit 5).

[14] Paul Girard, Director General, Specific Claims Branch, DIAND, to David Osborn, Commission Counsel, ICC, January 4, 2000 (ICC file 2108-1-2, vol. 1).

Commission's Senior Legal Counsel Kathleen Lickers, Robert Winogron, counsel with DIAND Legal Services, challenged the Commission's jurisdiction to inquire into the matter since the First Nation's claim had not yet been rejected by the Minister and the Commission's enabling legislation permitted it to inquire into and report on a claim only following such a rejection.[15]

The Commission prepared a documentary brief relating to the First Nation's allegations of delay, and distributed it to the parties on February 25, 2000. The parties agreed that the Commission would consider the challenge to its mandate on the basis of the documentary brief and supplementary filings.[16] Ultimately, the Commission issued its interim ruling on April 27, 2000, concluding, first, that the words "already rejected by the Minister" can include circumstances in which Canada's conduct is tantamount to a rejection, and, second, that Canada's conduct in the present circumstances constituted just such a rejection. The Commission thus concluded that it had authority to proceed with its inquiry to review the claim.[17] The full text of the Commission's interim ruling is attached to this report as Appendix A.

In the wake of this decision, Paul Girard advised Kathleen Lickers on July 21, 2000, that Canada was not in a position "to either assert that this claim has been appropriately rejected in accordance with the Specific Claims Policy, or that this claim can be accepted in accordance with the Policy." He added that it would be impossible for Canada to participate in the inquiry except as an observer, and that for this reason it would not be providing documentation to the Commission for the purposes of the inquiry. He undertook, however, to provide continuing updates on the status of Canada's legal review.[18]

As the inquiry progressed, the Commission conducted a planning conference in Edmonton on July 28, 2000, and scheduled the exchange of written submissions between the parties by December 7, 2000.[19] However, the federal election of November 27, 2000, intervened, prompting counsel for Canada to seek an adjournment to permit it to obtain fresh instructions once the new government was in place. With the consent of the First Nation, the delivery of written submissions was adjourned to early 2001, with oral arguments scheduled for February 27, 2001.[20]

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[15] Robert Winogron, Counsel, DIAND Legal Services, to Kathleen Lickers, Senior Legal Counsel, ICC, February 7, 2000 (ICC file 2108-1-2, vol. 1).

[16] David E. Osborn, Commission Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Robert Winogron, Counsel, DIAND Legal Services, March 16, 2000 (ICC file 2108-1-2, vol. 1).

[17] ICC, *Interim Ruling: Alexis First Nation – TransAlta Utilities Right-of-Way Inquiry, Ruling on Government of Canada Objections*, April 27, 2000 (ICC file 2108-1-2, vol. 1).

[18] Paul Girard, Director General, Specific Claims Branch, DIAND, to Kathleen Lickers, Senior Legal Counsel, ICC, July 21, 2000 (ICC file 2108-1-2, vol. 1).

[19] Kathleen N. Lickers, Senior Legal Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, DIAND Legal Services, October 4, 2000 (ICC file 2108-1-2, vol. 1).

On January 29, 2001, however, Canada formally rejected the First Nation's claim. Assistant Deputy Minister W.J.R. Austin responded point by point to the Alexis submissions, denying that the compensation paid to the First Nation was inadequate, that Canada had failed to satisfy any fiduciary obligations it may have had with respect to the negotiations between Calgary Power and the Band, or that Canada had any obligation to advise the Band of its taxation or other powers under the *Indian Act*.[21] The full text of Austin's letter is attached to this report as Appendix B. With the arrival of this letter, the Commission granted the First Nation an adjournment to allow it to address Canada's position in its written submissions.

At the same time, the First Nation's litigation in the Federal Court of Canada, placed in abeyance by order of Lemieux J on March 11, 1999, came up for a status review by the court on February 16, 2001. On February 9, 2001, to allow the First Nation to meet its February 16 deadline in court, the Commission issued its oral decision to proceed with the inquiry notwithstanding its understanding that the First Nation was in the pleadings stage of litigation in the Federal Court. The parties subsequently asked the Commission to provide written reasons for its decision, and it did so on March 9, 2001. The Commission's interim ruling is attached to this report as Appendix C.

Despite Canada's difficulty in deciding how to proceed in light of this decision, the Commission continued with the inquiry, first meeting with elders Nelson Alexis, Phillip Cardinal, former Chief Howard Mustus, and current Chief Francis Alexis on May 31, 2001, to obtain "willsay" statements regarding the evidence likely to be forthcoming in the community session. The Commission provided the parties with an unofficial transcript of the elders' recorded statements on July 12, 2001. With the community session and oral submissions tentatively scheduled for September 26 and 27, 2001, in Edmonton, the Commission contacted counsel for both parties on September 5, 2001, to confirm that they were willing and able to proceed.[22] Counsel for Canada responded that the government would not participate in the inquiry as long as the First Nation insisted on actively pursuing its litigation instead of placing the Federal Court action in abeyance.[23] Eventually, counsel for the First Nation agreed to place the litigation in abeyance pending the delivery of the Commission's final report.

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[20] Kathleen N. Lickers, Senior Legal Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, DIAND Legal Services, November 2, 2000 (ICC file 2108-1-2, vol. 1).

[21] W.J.R. Austin, Assistant Deputy Minister, Claims and Indian Government, DIAND, to Chief Francis Alexis, Alexis First Nation, January 29, 2001 (ICC Exhibit 12B, pp. 1–8).

[22] Kathleen N. Lickers, Commission Counsel, ICC, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solictors, and Carole Vary, DIAND Legal Services, September 5, 2001 (ICC file 2108-1-2, vol. 2).

The community session took place at the Alexis reserve on December 5, 2001; the First Nation filed its written submissions on May 24, 2002; Canada filed its written submissions on July 16, 2002; and the First Nation filed reply submissions on July 31, 2002. The oral hearing of the parties took place in Edmonton on August 20, 2002.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix D of this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[24] This Policy, outlined in the Department of Indian Affairs and Northern Development's 1982 booklet entitled ***Outstanding Business: A Native Claims Policy – Specific Claims***, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation"on the part of the federal government.[25] The term "lawful obligation" is defined in ***Outstanding Business***as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.

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[23] Carole Vary, DIAND Legal Services, to Kathleen N. Lickers, Commission Counsel, ICC, September 10, 2001 (ICC file 2108-1-2, vol. 2).

[24] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[25] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994), 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

iv) An illegal disposition of Indian land.[26]

The Commission has been asked to inquire into and report on whether the Alexis First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

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[26] *Outstanding Business*, 20; reprinted in (1994), 1 ICCP 171 at 179–80.

PART II

HISTORICAL BACKGROUND

TREATY 6 AND THE CREATION OF IR 133

In August and September 1876, Canada sent Treaty Commissioner Alexander Morris, the Lieutenant Governor of Manitoba and the North-West Territories, together with fellow Commissioners James McKay and W.J. Christie to meet at Fort Pitt, Fort Carlton, and Battle River with "the Plain and Wood Cree and the other Tribes of Indians" to negotiate Treaty 6. From Canada's perspective, the purpose of the treaty was to open up the 121,000-square-mile Treaty 6 area for settlement, immigration, and other purposes and to establish "peace and good will" between the Indians and the government. In exchange for the Indians' surrender of their rights to this territory, Canada agreed, among other things, to "lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families."[27] The treaty continued:

> Provided, however, that ... the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained;
> ...
>
> It is further agreed between Her Majesty and Her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings, of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.[28]

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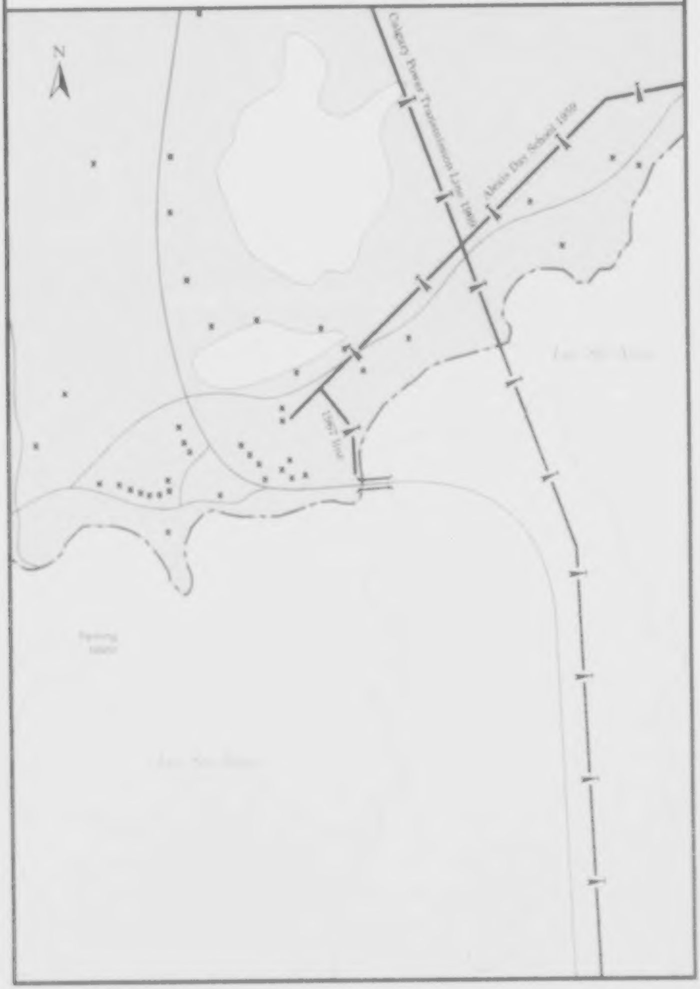
[27] Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993), 35–37 (ICC Exhibit 10, p. 2).

[28] Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993), 37 (ICC Exhibit 10, p. 2).

Map 2


N
Calgary Power Transmission Line 1960
Alexis Day School 1959
1967 Line
Lac Ste. Anne
Lac Ste. Anne

The following year, on August 21, 1877, in the presence of interpreter Peter Erasmus and three other witnesses, Chief Alexis Kees-kee-chee-chi and Headman Oo-mus-in-ah-soo-waw-sinee executed an adhesion to Treaty 6 on behalf of the ancestors of the present-day Alexis First Nation.[29]

To fulfill the Crown's obligations to provide reserve land, Dominion Land Surveyor George A. Simpson laid out IR 133 on the north shore of Lac Ste Anne for the Alexis Band in October 1880. Comprising 23 square miles, the reserve was confirmed by federal Order in Council PC 1151 on May 17, 1889,[30] and withdrawn from the operation of the *Dominion Lands Act* on June 12, 1893, by Order in Council PC 1694.[31]

THE 1959 DISTRIBUTION LINE

The events of primary interest in this inquiry did not begin to unfold until the mid-1950s. In 1953, planning began for the new Alexis Indian Day School situated in the SE 11-55-4-W5M. In addition to a two-classroom building to be erected near the north shore of Lac Ste Anne, the plans included the drilling of a well because the lake water was not suitable for drinking. Concurrent plans for an upgraded school on the nearby Wabamun reserve of the Paul Band called for that building to be wired in preparation for electrification since power lines already ran within a mile of the existing building on that reserve, but no such intentions were expressed for the Alexis school at that time.[32] On May 26, 1954, the Alexis Indian Day School officially opened.[33]

By 1958, the Edmonton Agency of Indian Affairs initiated plans to upgrade the school by constructing an additional classroom with a basement, replacing the two existing wood furnaces with an oil-fired hot water heating system, providing new lavatory facilities served by a pump at the existing well and a septic field, and developing existing basement space for industrial arts and home economics programs. Architect H.J. Slawek reported on September 22, 1958, that, as part of the improvements, "Indian Affairs are bringing power to this school this year."[34] Four months later, in a letter to E.A. Gardner, architect with the Public Works Department, Indian Affairs Branch Director H.M. Jones provided additional instructions to be transmitted to the district architect in preparation for the tendering process:

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[29] Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993), 44–45 (ICC Exhibit 10, p. 7).

[30] Canada, Order in Council PC 1151, DIAND, Indian Land Registry, Registration No. B4000 (ICC Exhibit 10, pp. 8–12).

[31] Canada, Order in Council PC 1694, DIAND, Indian Land Registry, Registration No. 1151-6 (ICC Exhibit 10, pp. 13–17). The Commission is not deciding in this report whether Simpson's survey of IR 133 satisfied Canada's obligation to provide land under Treaty 6.

[32] G.H. Gooderham, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Citizenship and Immigration, to Charles H. Buck, Chief, Engineering and Construction Services, Indian Affairs Branch, Department of Citizenship and Immigration, April 25, 1953, National Archives of Canada (hereafter NA), RG 10, vol. 8678, file 774/6-1-007, part 1, reel C-14199 (ICC Exhibit 10, p. 52).

[33] H.N. Woodsworth, Superintendent, Edmonton Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to E.A. Robertson, Acting Regional Supervisor of Indian Agencies, May 5, 1954, NA, RG 10, vol. 8678, file 774/6-1-007, part 1, reel C-14199 (ICC Exhibit 10, p. 51).

> 1. The existing building is not at present wired for electricity. This should be included in the tendering material now being prepared.
>
> 2. Electric power will be brought to the site by this Department.[35]

In May 1959, R.F. Battle, Indian Affairs' Regional Supervisor for Alberta and the North-West Territories, informed headquarters that the estimated cost of extending electrical power to the school would be roughly $4,000. He added that this figure had been placed in the estimates for that year and that, although no application for the service had yet been made, power could be expected at the site by September 1, 1959, if application was made immediately.[36]

More concrete figures were supplied by Will Smith, the commercial supervisor, Edmonton Division, for Calgary Power on June 15, 1959. Smith estimated the cost of bringing a 7620-volt line 3¾ miles north from the NE 23-54-4-W5M – "the shortest route" – would be $6,191, including the cost of a transformer. He noted, however, that it would be to the Band's advantage to bring power in from the east because it would provide opportunities to split the costs among a number of consumers:

> [B]earing in mind the probable development of summer services to the east of the Indian reserve we would build the line extension from Gunn, and of course expecting the summer service customers to pay their proportionate share of the costs....
>
> We would ask your departments to pay a construction contribution of $2500.00.[37]

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[34] H.J. Slawek, Architect, Public Works Department, "Site Investigation Report, Edmonton Agency – Alexis," September 22, 1958, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, pp. 105–6).

[35] H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, to E.A. Gardner, Chief Architect, Building Construction Branch, Public Works Department, January 23, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 112).

[36] R.F. Battle, Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, May 1, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 114).

[37] Will Smith, Commercial Supervisor, Edmonton Division, Calgary Power, to G.S. Lapp, Superintendent, Indian Affairs Branch, Department of Citizenship and Immigration, June 15, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 115).

Battle forwarded this information to the Indian Affairs Branch in Ottawa on June 18, 1959,[38] where it was referred to the Treasury Board and recommended for acceptance by Jones. Noting that Calgary Power was "the only firm in the area capable of performing the work," Jones remarked that "[t]he rates for the supply of electricity will not exceed the established rates charged other comparable consumers in the locality." He mistakenly added that the line would be run a distance of 3¾ miles, clearly referring to the length of line required had it been brought in from the south rather than from the east as the proposal actually contemplated.[39] Nevertheless, by Treasury Board Minute 551195 dated July 2, 1959, Calgary Power's tender to construct the line was accepted.[40]

The next step to be addressed was obtaining authority from the Band for Calgary Power to erect its power line within IR 133. At the time, there were three means by which this could be accomplished. The first was a permit under section 28(2) of the 1952 *Indian Act*, which stated:

> [**28**](2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.[41]

In a *Land Management and Procedures Manual* issued in 1983, Indian Affairs remarked that permits under section 28(2) were "appropriate for rights-of-way for utility distribution power lines serving users on a Reserve" and "to facilitate access within the Reserve" but "not for the purpose of crossing through the Reserve." The manual added that an interest granted under section 28(2) could not be "exclusive to the permittee."[42] As the legislation indicated, any such interest of longer than one year in duration required the approval of both the Band Council and the Minister responsible for Indian Affairs. According to the PHI report, permits under section 28(2) represented the most common means by which public utility easements were created across Indian reserves, with the form of the document ranging from "a simple letter" to a formal legal agreement between the Minister and the company involved.[43]

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[38] R.F. Battle, Regional Supervisor – Alberta and North-West Territories, to Indian Affairs Branch, June 18, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 117).

[39] Department of Citizenship and Immigration, "Authority to Enter into Contract, Details of Request to the Honourable the Treasury Board," June 24, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 118).

[40] Department of Citizenship and Immigration, Indian Affairs Branch, "Authority for Expenditure," July 9, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 119).

[41] *Indian Act*, RSC 1952, c. 149, s. 28(2), as amended by SC 1956, c. 40, s. 10.

[42] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, pp. 68–69).

The second method by which authority might be granted to Calgary Power to occupy and use a right of way within IR 133 was under the expropriation provisions in section 35 of the 1952 *Indian Act*. Section 35 stated:

> **35**(1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.
>
> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
>
> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).[44]

It appears to be agreed between the parties to this inquiry that, at all material times, Calgary Power was a corporation with powers of expropriation as contemplated by section 35(1) of the 1952 *Indian Act*. The authority of corporations such as Calgary Power to expropriate was set out in *The Water, Gas, Electric and Telephone Companies Act* of Alberta.[45]

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[43] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 27 (ICC Exhibit 6, p. 27).

[44] *Indian Act*, RSC 1952, c. 149, s. 35.

[45] *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, c. 361, ss. 30–33, as amended by SA 1956, c. 60, s. 4.

The 1983 *Land Management and Procedures Manual* suggests that the expropriation provisions were appropriate in circumstances differing from those intended by section 28(2):

> Section 35 of the Indian Act should only be resorted to when a provincial or municipal government body, or any public or private corporation having the power to expropriate, requires Reserve land for a purpose which will, of necessity, involve the *exclusive use* of the land so required. That is, Section 35 generally anticipates the outright transfer of control and administration of the subject lands, although it is possible that something less than such absolute control and administration may be transferred as is the case with easements for public utility purposes.[46]

The manual further suggested that easements under section 35 were for "transmission facilities which go from a point outside the Reserve, through the Reserve to another point outside the Reserve and which provide little or no service to the Reserve itself." Examples of the types of transmission facilities requiring authorization under section 35 were "aerial easements for high tension transmission lines, underground easements for pipelines, water lines and gas lines."[47] By the terms of section 35, rights of way of this sort, despite being relatively exclusive in terms of use and typically granted for lengthy periods of time if not in perpetuity, required only the approval of the Governor in Council and not band consent. However, according to government researcher Vivian Little, it appears that, in the 1950s, Indian Affairs began obtaining band council consent before submitting expropriations for approval by the Governor in Council, the only exception being cases in which the national interest was paramount.[48]

PHI comments that, in these early years, before the policies for granting utility rights of way were reviewed in the late 1960s, there were certain common features to rights issued under both section 28(2) and section 35:

> With both Section 28(2) permits and Section 35 takings, the compensation for the easement, if any, was paid to the band (and in some cases to band members for improvements and locatee interests) in a lump sum without provision for annual rentals or periodic review of compensation. In cases where the easement provided a benefit to the band, for instance, electric power or telephone service, nominal com-

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[46] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, p. 57). Emphasis added.

[47] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, pp. 70–71).

[48] Vivian Little, "Guidelines on Expropriations," March 1994 (ICC Exhibit 7, pp. 7–9).

> pensation was often paid to the Band. Reversionary rights in favour of the Band, should the land no longer be required for a right of way, were uncommon.[49]

The third way in which authority could be granted to Calgary Power to erect and maintain its power lines on IR 133 in 1959 was by virtue of the surrender provisions set forth in sections 37 through 41 of the 1952 *Indian Act*.[50]

The surrender provisions permitted a surrender that was absolute or qualified, conditional or unconditional. They were attractive in terms of the greater certainty afforded by obtaining the consent of the entire band to a disposition of rights within a reserve. However, the stringent technical requirements of those provisions meant that the required consent could be more difficult and time-consuming to obtain than the relatively more streamlined authorizations by the band council alone under section 28(2) and – in practice although not required by law – under section 35. The surrender provisions were not utilized to grant any of the rights of way at issue in this claim.

On October 21, 1959, the question of the right of way for Calgary Power's electrical power distribution line to the upgraded Day School was considered by the Alexis Band Council. There is no evidence before the Commission regarding the nature of the discussions between the Band Council and Calgary Power or the involvement, if any, of representatives of Indian Affairs on the Band's behalf. Nevertheless, the Band Council authorized the right of way by means of a resolution, executed by Councillors John Cardinal, Willie Lefthand, and Paul Kootenay, that stated:

> THAT CALGARY POWER CO. LIMITED be granted an easement thirty feet in width for a power line to extend from the east side of Alexis Reserve between Sections 7 and 18, Township 55, Range 3, West 5th and Section 12 & 13, Township 55, Range 4 West of the 5th for approx 7/8th of a mile, thence in a southwesterly direction to the school located in S.E.¼ Section 11, Township 55, Range 4, West of the 5th Meridian; this distance being approximately one mile, making a total distance through the Reserve of 1, 7/8th miles; with the following conditions:
>
> 1. That members of Alexis Band be employed to brush right-of-way.
>
> 2. That no payment be made to Alexis Band Funds for this easement.[51]

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[49] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 28 (ICC Exhibit 6, p. 28).

[50] *Indian Act*, RSC 1952, c. 149, ss. 37–41, as amended by SC 1956, c. 40, s. 11.

[51] Alexis Band, Band Council Resolution, October 21, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 124–25).

Of note in this BCR are the clause foregoing the payment of compensation for the easement, the stipulation requiring Calgary Power to employ band members to clear the right of way, and the absence of any term defining the length of time during which the right of way and associated rights would remain in effect. Moreover, because the right of way had been authorized by the Band Council rather than the entire Band, the permit could not be issued under the surrender provisions of the *Indian Act*, but the resolution also makes no mention of whether it would be issued pursuant to section 28(2) or section 35. Nevertheless, J.R. Wild, the Superintendent of the Edmonton Indian Agency, forwarded the resolution to Regional Supervisor Battle on October 23, 1959, with a recommendation that the Indian Affairs Branch approve it.[52]

During the community session in this inquiry, elders Howard Mustus, Phillip Cardinal, and Chief Francis Alexis spoke of the process by which the Band Council authorized the use of the 1959 and subsequent rights of way. Howard Mustus commented:

> As I spoke this morning to one of the elders and I was asking him about a number of concerns including this one here, and to his knowledge, the process did not allow for the consent of the peoples of the First Nations of Alexis during these times. Instead, what happened was it was the Indian agent on behalf of the Federal Crown acting mainly to satisfy, in this case, Trans-Alta where there was already a preconceived agreement that was made and the Indian agent's responsibility was to round up the leadership and go through the motions of consent.
>
> There is no record or no awareness in our community whether there was a referendum held to consent, to approve of those specific facilities coming and establishing. I think all that was claimed was that it was going to be a benefit to the membership if electricity was brought in. But at no time was there any explanation of the loss of uses to those right-of-ways. There was no explanation of any kind what the future implications of the decision that was made of those players of that day.[53]

Chief Francis Alexis added:

> [T]hat first phase of power in 1959, at that time my dad was Chief and he didn't know how to read and write. And I remember at that time I don't think we had legal representation or anything, just based on what the Indian agent said.[54]

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[52] J.R. Wild, Superintendent, Edmonton Indian Agency, to R.F. Battle, Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, October 23, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2 (ICC Exhibit 10, p. 126).

[53] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 14–15, Howard Mustus).

[54] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 19, Chief Francis Alexis).

Similarly, Phillip Cardinal remarked:

> We didn't have that kind of expertise to tell us, you know, it's worth this much or anything like that. There was no lawyers or no kind of consultants around to really advise us on that or advise on leadership or anything like that.[55]

These comments from the First Nation's elders echo a report in which the Superintendent of the Edmonton Agency, in discussing the development of band councils within the agency in 1966, wrote:

> It is evident that the Enoch Band Council is fairly capable of operating more independently, where as, Alexis, Alexander, Paul and Beaver Lake Councils still require considerable guidance and will do so for some time.[56]

Within two weeks of the BCR, W.C. Bethune, Chief of Reserves and Trusts, advised his counterpart in the Education Division on November 2, 1959, that the requested easement would be granted to Calgary Power.[57] Four days later, Bethune forwarded three copies of a permit to Battle to be signed by Calgary Power under seal and returned to Ottawa for execution by the Minister. Bethune noted that "[t]he permit is made in consideration of the nominal sum of $1.00 which it is not necessary to collect."[58] He also acknowledged receipt of "the application by Calgary Power Limited for a power line right-of-way on Alexis Indian Reserve No. 133 to serve the Alexis Indian Day School," but PHI notes in its historical report that "no such [application] document has been located."[59]

On December 16, 1959, Battle forwarded the three copies of the permit, duly executed by Calgary Power, to headquarters with a request that they be returned to him for distribution following execution by the department.[60] After the document was recorded as Permit No. 431, Bethune complied with Battle's request, providing him with two fully executed copies of the permit on December 29, 1959, and directing him to provide one to Calgary Power.[61]

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[55] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 35, Phillip Cardinal).

[56] Superintendent's Report, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, March 3, 1966, to September 30, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797, p. 3 (ICC Exhibit 10, p. 172).

[57] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to Chief, Education Division, Indian Affairs Branch, Department of Citizenship and Immigration, November 2, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2, reel C-14199 (ICC Exhibit 10, p. 127).

[58] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.F. Battle], Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, November 6, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 129).

[59] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 6, p. 4). By way of comparison, Calgary Power's brief one-page letter in application for a 150-foot right of way through the Wabamun reserve of the Paul Band in 1961 is included in the supporting documentation with the PHI report (ICC Exhibit 10, p. 152).

The permit, dated November 9, 1959, and expressly issued under section 28(2) of the *Indian Act*, granted Calgary Power (referred to in the document as "the Permittee"), its successors, and assigns the right to construct, operate, and maintain an electric power transmission line on the 30-foot right of way as shown in red on a sketch attached to both the BCR and the permit itself. The permit further provided that the permission granted to Calgary Power was subject to additional stipulations, including the permittee's right of access to the land, the right to cut down trees for safety purposes, subject to reimbursing the Minister, and the following:

> 1. That the rights hereby granted may be exercised by the Permittee for such period of time as the said right-of-way is required for the purpose of an electric power transmission line.
>
> 2. That the Permittee shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said electric power transmission line or the use by the Permittee of the said lands.[62]

In short, the permit granted Calgary Power an interest for as long as the right of way would be required for power line purposes. That interest included the right to remove trees and "to do all such other acts and things as may be necessary or requisite for the purpose of properly erecting, operating, maintaining and patrolling the said electric power transmission line." As PHI remarks in its historical report, the permit did not incorporate the condition in the BCR stipulating that band members be employed to "brush" or clear the right of way, nor is there documentary evidence or clear oral testimony to indicate whether band members actually were employed to do so.[63]

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[60] R.F. Battle, Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, December 16, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 136).

[61] W.C. Bethune, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.F. Battle], Regional Supervisor – Alberta and North-West Territories, Indian Affairs Branch, Department of Citizenship and Immigration, December 29, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, 137).

[62] Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., November 9, 1959, DIAND, Indian Land Registry, Registration No. R11437 (ICC Exhibit 4, pp. 34–36).

Moreover, neither the BCR nor the permit specifies the area of the right of way, although it was identified as being 30 feet in width and approximately 1⅞ miles in length. Nine years later, on January 10, 1968, when Indian Affairs was considering the survey of the 1967 extension of the 1959 power line and questioning whether the 1959 line should be formally surveyed at the same time, Calgary Power's land agent, S.C. Johnson, explained why the earlier right of way had never been surveyed and why, in the company's view, it should remain unsurveyed:

> The line in question was constructed to serve the school on the Reserve and a portion of the cost of the line was paid by Indian Affairs. If a legal survey would have been required at that time the cost to Indian Affairs would have been greater. For this reason an easement was granted on a sketch plan (file 110/31-3-3).
>
> In view of this we question whether a legal survey of the right-of-way would be of sufficient advantage to warrant the cost involved.[64]

Finally, the permit obliged Calgary Power to "pay all 'charges, taxes, rates and assessments'"whatsoever that might be or "be expressed to be" due and payable in relation to the power line or Calgary Power's use of the right of way during the term of the permit. However, as the April 1996 SCW report observes, "[n]o evidence has been located that would indicate that any charges other than the expressed consideration of one dollar were ever levied or assessed on the utility by the Crown."[65]

THE 1967 DISTRIBUTION LINE EXTENSION

On April 4, 1966, the Alexis Band issued another Band Council Resolution, this one relating to the proposed extension of Calgary Power's 1959 distribution line. The record before us includes no evidence regarding the nature of the discussions between the Band and Calgary Power or the involvement, if any, of Indian Affairs in those discussions. The resolution, signed by Chief Willie Lefthand and Councillors Lawrence Mustus, Mike Paul, J.B. Mustus, and John Cardinal, stated:

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[63] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 6 p. 4).

[64] S.C. Johnson, Land Agent, Calgary Power Ltd., to T.A. Turner, District Supervisor, Indian Affairs Branch, DIAND, January 10, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 257).

[65] "Alexis Powerline Easement Claim," prepared at the request of Specific Claims West, April 29, 1996, p. 7 (ICC Exhibit 4 p. 7).

> That the Alexis Band Council grant Calgary Power Ltd. an easement from near John Cardinal to the Lake shore and along the Lake to the Bridge.
>
> Calgary [Power] Ltd. aggree [sic] to pay $15.00 per pole & $15.00 per guy wire.[66]

As the PHI report suggests, the BCR provided for fixed compensation for each pole and guy wire but it did not state the number of poles and guy wires to be installed.[67] Moreover, unlike the 1959 BCR, the 1966 document made no provision for band members to clear the proposed right of way.

The Acting Supervisor of the Edmonton Indian Agency, N.M. McGinnis, forwarded the BCR to R.D. Ragan, Indian Affairs' Regional Director for Alberta, on April 26, 1966, with his recommendation that it be approved. McGinnis advised Ragan that the Band Council had met with Calgary Power's Johnson on April 4 and that, "[a]lthough the Resolution is not too specific, the Council has given us their assurance that [it] is in order." He added that "[t]he main purpose of the extension is to provide power to the cottages at West Cove on Lac Ste. Anne."[68] A later memorandum dated February 12, 1968, from J.H. MacAdam, Deputy Administrator of Lands, to Ragan similarly differentiated between "a) the Power Line Right-of-Way *servicing Departmental requirements on the Reserve* and; b) the extension from it servicing cottages along the lake shore."[69]

Although some of the evidence, including the PHI report,[70] originally suggested that the cottages at West Cove were part of the reserve, topographical maps compiled by Energy, Mines and Resources Canada appear to situate West Cove on the south side of Lac Ste Anne outside the limits of IR 133. Nevertheless, although the "main purpose" of the 1967 extension, as identified by McGinnis, was to service the cottages at West Cove, it appears that the extension was also used to provide electrical services to the reserve in addition to those already at the Day School. Howard Mustus and Chief Alexis testified that electrification on IR 133 occurred from 1967 to 1969 "right after centennial year,"[71] and that before then band members went to the school to watch television because it was the only place on the reserve with power.[72] Howard Mustus provided further evidence that the 1967 distribution line extension was the means by which electrical services were brought to band members on the reserve.[73] Similarly, the Edmonton-Hobbema District semi-annual report for the six-month period ending September 30, 1967, confirms that contracts were let for the electrification of 55 homes on the Alexis reserve.[74]

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[66] Alexis Band, Band Council Resolution, April 4, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 166).

[67] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 7 (ICC Exhibit 6, p. 7).

[68] N.M. McGinnis, Acting Superintendent, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta Indian Affairs Branch, Department of Citizenship and Immigration, April 26, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 167).

[69] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, February 12, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 259). Emphasis added.

[70] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 7).

On receiving the April 4, 1966, BCR and McGinnis's recommendation, Ragan forwarded them to headquarters in Ottawa on May 19, 1966, adding his own recommendation that the resolution be approved "on the understanding that a proper survey of the line will be supplied by Calgary Power Co. Ltd. when the line is completed."[75] Within two weeks, W.P. McIntyre, Indian Affairs' Administrator of Lands, replied that the resolution had indeed received Indian Affairs' blessing. He instructed Ragan to obtain a plan and legal description acceptable to Calgary Power as well as payment of the necessary moneys, at which time Indian Affairs would prepare the formal permit. He added that, "[i]f the Power Company require an easement, it will be necessary that it provide a legal survey plan and description in accordance with the instructions of the Surveyor of Canada."[76]

On November 1, 1966, Ragan forwarded the semi-annual report for the Edmonton Indian Agency for the period ending September 30, 1966.[77] The report noted that electric power had been extended to 12 houses on the Alexis reserve and that the Band planned further electrification during 1967 and 1968.[78] The report did not deal with the specifics of the distribution line extension as set forth in McIntyre's letter of June 1, however, and on November 25, 1966, McIntyre wrote to Ragan to request an update.[79] Although the record contains no evidence of a reply from Ragan to McIntyre, it appears that someone in the Edmonton office corresponded with Calgary Power on December 12, 1966, as Johnson wrote back eight days later enclosing a rough sketch of the proposed line and a cheque for $195, representing payment for 13 poles and guy wires at the $15 rate stipulated in the Band Council Resolution. Johnson apologized for the delay, adding that the legal survey, which he also found had not been done, would be forwarded to Indian Affairs upon completion.[80]

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[71] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 17, Howard Mustus, and p. 18, Chief Francis Alexis).

[72] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 70, Chief Francis Alexis).

[73] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 76, Howard Mustus).

[74] DIAND, Indian Affairs Branch, Edmonton-Hobbema District, "Semi-Annual Report – April 1/67 – September 30/67," NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797 (ICC Exhibit 10, pp. 227–35).

[75] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, May 19, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 168).

[76] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, June 1, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 169).

[77] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, November 1, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797 (ICC Exhibit 10, p. 176).

[78] Superintendent's Report, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, March 31, 1966 to September 30, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797, p. 4 (ICC Exhibit 10, pp. 170–74).

On January 11, 1967, C.H. Weir, a surveyor with the Edmonton firm Stewart Weir Stewart & Watson, wrote to Surveyor General R. Thistlethwaite to obtain instructions for surveying the right of way for the power line extension within the Alexis reserve. Weir also provided a sketch, similar to the one enclosed with Johnson's letter of December 12, 1966, each showing the proposed extension jutting almost perpendicularly to the southeast from the existing 1959 distribution line to the north shore of Lac Ste Anne near the bridge across The Narrow.[81] An official in Thistlethwaite's office noted the existing power line right of way and contacted Indian Affairs to obtain further information, since the short 1967 extension was to be formally surveyed although the longer 1959 line had not:

> Seems illogical that the long power line R/W was not surveyed and the short one has to be surveyed. We will end up with a survey "hanging" in mid air.[82]

Despite these concerns, Thistlethwaite issued survey instructions to Weir on January 31, 1967.[83] Weir delivered the final plan of survey on linen to

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[79] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, November 25, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 177).

[80] S.C. Johnson, Land Agent, Edmonton Division, Calgary Power Ltd., to Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, with attached sketch, December 20, 1966, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 178–79).

[81] C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, January 11, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, pp. 184–86).

[82] Marginalia by Surveyor General's office on C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, January 11, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, pp. 184–86).

[83] R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, to C.H. Weir, Stewart Weir Stewart & Watson, January 31, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 187–88).

Thistlethwaite for filing on March 3, 1967.[84] In the course of reviewing the plan, Thistlethwaite routed it through Indian Affairs with a request to be advised of the circumstances of the transaction for which the plan had been prepared and of whether the plan was suitable for that purpose.[85] The request prompted McIntyre to ask Ragan to clarify whether the BCRs of October 21, 1959, and April 4, 1966, concerned the same matter.[86] Ragan referred the inquiry to Turner, the District Supervisor, who replied:

> It would appear that there is some confusion over the two Band Council Resolutions. The resolution dated October 21, 1959, was approving the original power line that entered the Reserve on the east boundary and crossed the Reserve to the Alexis Day School and skating rink. The resolution dated April 4, 1966 was allowing the power company to tap onto this line and cross the Reserve to extend power services to the cottages at West Cove on the southwest shore of Lac St. [sic] Anne.
>
> The attached print is in fact a legal survey of the sketch that was forwarded on January 6, 1967, and no permit [for the extension] has been issued to date.
>
> The permit issued on November 9, 1959, was to cover, as I mentioned in paragraph one, the original power line not the tap.[87]

Turner attached his own rough sketch of the 1959 distribution line and the 1967 extension for further clarification.[88] Ragan forwarded Turner's "self-explanatory memorandum" and sketch to McIntyre on May 4, 1967.[89]

Armed with this information, J.L. Menard of McIntyre's office responded on May 9, 1967, to Thistlethwaite's inquiry of March 13. Menard advised that Indian Affairs intended to issue a Licence of Occupation pursuant to section 28(2) of the *Indian Act* and that the plan appeared suitable.[90] After Thistlethwaite had reviewed the plan and obtained corrections from Weir, it was given final approval. On August 30, 1967, the plan, recorded in the Canada Lands Surveys Records as Plan 53492, was registered with Alberta's Land Titles Office.

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[84] C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts, Department of Mines and Technical Surveys, March 3, 1967, Natural Resources Canada, Legal Surveys Division, file SMS209-066-46, vol. 1 (ICC Exhibit 10, p. 192).

[85] R. Thistlethwaite, Surveyor General, Department of Mines and Technical Surveys, to M.B. Downey, Indian Affairs Branch, Department of Citizenship and Immigration, March 13, 1967, Natural Resources Canada, Legal Surveys Division, file SMS209-066-46, vol. 1 (ICC Exhibit 10, p. 193).

[86] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, March 31, 1967, Natural Resources Canada, Legal Surveys Divison, file SMS209-066-46, vol. 1 (ICC Exhibit 10, p. 194).

[87] T.A. Turner, District Supervisor, Edmonton-Hobbema District, Indian Affairs Branch, Department of Citizenship and Immigration, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, April 25, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 202).

[88] "Alexis Reserve 133," undated, showing existing power line to school and skating rink (Band Council Resolution, October 21, 1959) and extension to West Cove (Band Council Resolution, April 4, 1966), Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 202–3).

[89] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, Department of Citizenship and Immigration, to Indian Affairs Branch, May 4, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 204).

With the exception of the compensation of $195 and the description of the right of way, the permit,[91] prepared by Indian Affairs and issued pursuant to section 28(2) of the *Indian Act*, was identical in all material respects to Permit No. 431 issued in 1959. McIntyre forwarded three copies to Ragan on July 5, 1967, with instructions to have the permit executed by Calgary Power.[92] After Ragan returned the signed copies of the permit to Ottawa on July 25, 1967,[93] McIntyre arranged for its execution by the Assistant Deputy Minister, and it was entered in departmental records as Permit No. 2375. He had two fully executed copies of the permit delivered to Ragan on August 9, 1967, for distribution to Calgary Power and the Edmonton-Hobbema Agency office.[94]

McIntyre's Deputy Administrator, J.H. MacAdam, then asked Ragan to find out if the company preferred a single permit for the 1959 and 1967 power lines, adding that, if so, a plan of survey for the 1959 line would be required.[95] Ragan passed this inquiry on to Turner in the Edmonton-Hobbema District office who in turn posed the question to S.C. Johnson of Calgary Power. In his response of January 10, 1968, Johnson asserted that the 1959 line, constructed in part at the expense of Indian Affairs, had been built to serve the Day School, and requiring a legal survey would have simply driven the government's costs higher. He questioned whether the expense of surveying the original 1967 line would be warranted.[96] In a memorandum dated February 12, 1968, to Ragan, MacAdam agreed, confirming that separate permits would be maintained for the 1959 distribution line and the 1967 extension, but advising that it would be necessary to file an amendment to the agreement, revising the description in accordance with the plan of survey for Permit No. 2375.[97]

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[90] J.L. Menard, Indian Affairs Branch, Department of Citizenship and Immigration, to R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, May 9, 1967, Natural Resources Canada, Legal Surveys Division, file SMS209-066-46, vol. 1 (ICC Exhibit 10, p. 195).

[91] Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., July 4, 1967, DIAND, Indian Land Registry, Registration No. 055615 (ICC Exhibit 10, pp. 212–17).

[92] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, July 5, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 218).

[93] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, to Indian Affairs Branch, July 25, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 220).

[94] W.P. McIntyre, Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, August 9, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 222).

[95] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to R.D. [Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, November 17, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 242).

The Amending Agreement deleted the interim description of the right of way and substituted the legal description provided by Thistlethwaite to McIntyre on October 10, 1967, while stating that "[a]ll other terms and conditions in the said Permit are hereby confirmed and shall remain unchanged."[98] Ultimately, the Amending Agreement was signed by Calgary Power and Canada on February 12, 1968;[99] however, there is no indication that the Alexis Band Council, whose consent was required for both the 1959 and 1967 lines, was advised of the amendment or received a copy of the Amending Agreement.

At the Commission's community session on December 5, 2001, the elders were asked to address Canada's contention that the delivery of electrical service to the reserve represented, in and of itself, an important benefit to the Alexis people. Howard Mustus testified that the distribution lines provided a benefit in one sense:

> The '67 hydro subsidiary lines that came into the Reserve were supposed to be a benefit to our people....
>
> Now we can watch TV which other people just took for granted for years and years and years. That was something that was very much welcome in the community. It meant that we didn't have to – rather than go start a fire by the old cars, just plug them in in the morning and off to work.
>
> Yes, it was welcome, and I believe that awareness was created – and as a matter of fact, I think there was, Phillip correct me if I'm wrong, but there was (inaudible) and the initial intent was being served.[100]

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[96] S.C. Johnson, Land Agent, Calgary Power Ltd., to T.A. Turner, District Supervisor, Indian Affairs Branch, DIAND, January 10, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 257).

[97] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, February 12, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 259).

[98] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., February 12, 1968, DIAND, Indian Land Registry, Registration No. L1117 (ICC Exhibit 10, pp. 262–64).

[99] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., February 12, 1968, DIAND, Indian Land Registry, Registration No. L1117 (ICC Exhibit 10, pp. 262–64).

[100] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 83–84, Howard Mustus).

Chief Alexis commented, however, that in other respects the lines have provided no lasting benefit to the reserve:

> [B]enefits has to be defined like education-wise, it's not benefitting our kids, recreation-wise, culture-wise, it hasn't benefitted us.
>
> But when you speak of service-wise, Trans-Alta providing us – our homes with electricity for TVs, electric ranges, fridges, appliances, in that way it's [a] benefit. But in – but we pay for those benefits. But other than that, education-wise, economic development wise, the whole community is not benefitting....
>
> The benefits we are enjoying is, yes, we are enjoying TV, electric ranges, fridges, modern appliances, but we pay for it through power bills and utility bills. It's not that it's been provided for us for free.[101]

In terms of economic benefits to the Band, neither the BCR of April 4, 1966, nor Permit No. 2375 in its original or amended form made any provision for the Alexis people to clear the right of way for the power line or to perform any other work related to the line's installation.

THE 1969 TRANSMISSION LINE

The Policy Context

By 1967, it appears that Canada had started to reconsider its policies regarding the means by which interests in reserves should be granted to third parties, and in particular whether it was appropriate to grant interests that were in effect permits in perpetuity under section 28(2) of the *Indian Act*. The impetus for this review seems to have started in the divisions of Indian Affairs responsible for mineral rights in relation to rights of way granted under the Indian Oil and Gas Regulations, but concerns came to be expressed with regard to other interests as well. On June 7, 1967, G.A. Poupore, Chief of the Lands, Membership and Estate Division, wrote to E.A. Moore, the Supervisor of Minerals in Calgary:

> For any rights-of-way which do not meet the special requirements of the Indian Oil and Gas Regulations Sections 28(2) and 35 [of the *Indian Act*] must be used to grant rights.
>
> A permit for a pipeline right-of-way issued under authority of Section 28(2) will not give the applicant the tenure which it requires. It is a permit only and cannot be issued for an indefinite period such as "as long as required" which in effect is a permit in perpetuity. As a matter of convenience and to avoid the necessity of the

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[101] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 82–83, Chief Francis alexis).

> applicant having to carry out a proper survey under instructions of the Surveyor General, we have issued permits "during the pleasure of the Minister". This is the only tenure we can grant under Section 28(2). It is realized that some permits have been issued under this Section "for as long as required". It is not our intention to terminate these at this time but no more will be issued and it is expected that these will be converted over a period of time into proper easements.
>
> All easements in perpetuity (as long as required) must be granted pursuant to the provisions of Section 35 of the Act [marginalia: "without surrender"] or by sale or lease following a surrender for that purpose. Inasmuch as there is no intention of adopting the latter method except in extremely special circumstances, Section 35 will be the means for granting easements to all bodies holding the power of expropriation in their charter.[102]

Moore's reply focused primarily on the perceived limitations of the Indian Oil and Gas Regulations, but he did address the implications of sections 28 and 35 of the *Indian Act*:

> If it is considered that the main problem in the use of Sec. 28(2) for pipelines is the indefinite tenure "For so long as required" it is pointed out that this could be overcome by use of a definite long term. Even major pipeline contracts and export permits are limited to 20 to 25 year terms. This seems to be mainly a question of settling on an acceptable policy between the Companies and the Branch. ...
>
> Section 35 appears to have been set up primarily to cover expropriation. There are few cases where this would apply in oil and gas development although this could be a problem for a major transmission line such as Trans Canada. There is a natural reluctance to use or imply the use of expropriation in routine applications and documents.[103]

On September 21, 1967, Poupore circulated his memorandum of June 7, 1967, to all regional directors and the Indian Commissioner for British Columbia, advising that it represented "policy to be followed in connection with the granting of easements in future for oil and gas pipelines under Section 35 of the Indian Act where no surrender of title is involved."[104] One week later, Ragan as the Regional Director for Alberta wrote back to confirm the "change in the procedure."[105]

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[102] G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, Department of Citizenship and Immigration, to [E.A. Moore], Supervisor of Minerals, Indian Affairs Branch, Department of Citizenship and Immigration, June 7, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 206).

[103] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, Department of Citizenship and Immigration, to G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, Department of Citizenship and Immigration, June 23, 1967, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 210).

[104] G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, DIAND, to All Regional Directors, Indian Commissioner for British Columbia, and Supervisor of Minerals, Indian Affairs Branch, DIAND, September 21, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, pp. 224–25).

The Deputy Administrator of Lands, J.H. MacAdam, replied on November 27, 1967, that "following a recent visit from oil company officials we may refer to our Legal Advisor the possibility that there might be further rights to proceed under Section 35 than we had hitherto suspected." He added:

> Insofar as Permits under Section 28(2) and easements under Section 35, we will in future definitely require Band Council Resolutions as in the past, and, within two years of date of permit, plans of Survey acceptable for recording by the Surveyor General of Canada. Easements under Section 35 will not be issued to companies not possessing powers of expropriation in their charters as a general rule until a legal opinion is received.[106]

The following day, Moore issued a wide-ranging discussion paper aimed primarily at the oil and gas industry but identifying general concerns with existing practices in granting interests under sections 28(2) and 35 of the *Indian Act*. He wrote:

> INDUSTRY PROCEDURES AND REQUIREMENTS
>
> a. Indian Minerals Development
>
> ...
>
> Provincial Crown, Freehold and Indian Affairs Branch Policy to date for easements or surface rights-of-way for gathering lines, water disposal lines, etc. requires a single initial payment sufficient to cover damage, severance, inconvenience etc. Annual rentals are not charged except in extremely rare cases. ...
>
> On Indian Reserves the terms for compensation are negotiated between the Band Council and the applicant. In most cases the Indians receive more than the non-Indian land owner. The latter is subject to expropriation procedures if a suitable agreement cannot be made and often cannot drive as hard a bargain as the Indians. Generally the Band Councils insist on use of as much Indian labour as possible and in forested areas line clearing and subsequent line cleanup in usually done by Indians. Because of lack of large scale equipment this often costs the companies more than work done by a general contractor.

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[105] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, to G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, DIAND, September 28, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 226).

[106] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, November 27, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 243).

b. Industry Development on Indian Reserves Not Involving Mineral Resources

...

Compensation for pipeline rights-of-way on Indian Reserves are negotiated between the Company and the Band Council with the advice of the Agency and Minerals Section, as in the case involving the development of Indian Mineral Resources. Usually the Band gets additional benefits in the form of work contracts. During recent years Indian Bands have received more compensation than non-Indians.

...

PROTECTION OF INDIAN RIGHTS

The protection of Indians seems to revolve around that provision of adequate safeguards to ensure that the Indian Bands will receive sufficient compensation in the form of initial payments and annual rentals and to ensure that future developments on the reserve will not be hampered by the issuance of rights to companies in the form of easements, leases, permits, etc. It is our contention that the Indians should receive compensation which is commensurate with that received by non-Indians under similar circumstances.

No problems exist with respect to the initial payments or annual rentals in accordance with present day practice. Negotiations between Band Councils and companies with the advice of the Agency and Minerals Section staff members generally result in higher payments than those received elsewhere. If provision is made to require the commencement of future annual rentals or increased annual rentals, as the case may be, no problem would exist with respect to normal compensation.

....

LEGAL ASPECTS

...

We are told that serious problems arise from the use of sec. 28(2) of the Act, although this does provide, and has provided for a number of years, a vehicle for issuance of a document which apparently would be accepted by Band Councils, Companies and Lending Institutions. Usually Band Councils have signed resolutions requesting suitable documents to be issued by the Branch without being very specific in the wording of the resolution; however, at the same time being aware of the intent of an application for a lease, easement, right-of-way, etc. Given proper guidance their resolutions could be very specific as to length of primary term, renewals, compensation, etc. This would be a minor problem, however because previous rights have been issued under this section with a minimum of documentation, the resolutions have never had to be specific.

Sec. 35 of the Indian Act might be applicable although there is considerable doubt and very little agreement in the views of about ten different solicitors that the writer has been dealing with. Most Bands on the prairies are very adamant on the subject of expropriation of Indian lands. The Stony Band takes the view that the use of this section to issue a permit to cover a negotiated agreement recognizes the right of a company to expropriate or at least apply for expropriation.... Other practical

> problems arise with this section with respect to whether the Band Council can approve or whether a Band referendum is needed to approve applications under this section....
>
> There appear to be no other suitable sections in the Indian Act for issuance of documents and in view of the serious difficulties with secs. 35, 37, [and] 39 it is strongly felt that sec. 28(2) be used unless some other workable solution is found.

Ultimately, Moore offered the following recommendations, among others:

> (2) Sec. 28(2) should be used until suitable amendments are made to the Act or the new Indian Act is passed.
>
> ...
>
> (5) Long-term contracts should be issued and subject to recommendation No. 6 suitable clauses should be provided to allow review at suitable intervals respecting annual rent, together with relocation in exceptional cases.
>
> (6) A hard look should be taken with respect to the necessity of specifying review periods as to additional terms of compensation. If it is legal and justifiable for a government to pass acts or regulations requiring payments on existing contracts there would be no need to specify review periods....
>
> (7) If clauses related to review of terms are inserted, it is strongly recommended that this be at the discretion of the Minister or delegated authority rather than the Band Council. This would not be met with as much opposition by the companies and since Band Councils are now approving applications for perpetual easements, it should not bother them that the Minister's name is used in order to decrease the length of term or increase compensation.[107]

By February 1968, it appears that the government had decided to continue granting rights over reserve lands using section 28(2) of the *Indian Act*, but subject to certain conditions. In response to an inquiry from H.J. Brown of Alberta Gas Trunk Line Company Limited,[108] MacAdam advised that "[t]he Minister has determined that permits under Section 28(2) of the Indian Act may continue to be issued 'for as long as required,' for petroleum product pipelines." He continued:

> The Minister has also indicated his feeling that the amount of compensation as well as the manner of payment should be reviewed on a periodic basis. Rights-of-way

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[107] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, "Surface Right-of-Entry to Indian Reserves – Petroleum Industry Easements, Rights-of-Way, Access Roads," November 28, 1967, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 244–54).

[108] H.J. Brown, Land Manager, Alberta Gas Trunk Line Company Limited, to Department of Citizenship and Immigration, March 19, 1968, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 273).

> permits to petroleum product carriers under this section of the Indian Act are therefore being granted for so long as required for pipeline purposes, subject to review at regular intervals as to the amount and manner of payment of compensation.[109]

Similarly, in an April 5, 1968, memorandum to Ragan, Moore confirmed that, in their February 12, 1968, meeting with R.G. Young, the Chief of Indian Affairs' Resources and Industrial Division, the three had agreed on permits in perpetuity subject to periodic reviews with provision for arbitration. It was clear, however, that, in addition to the reluctance of the companies to accept this approach, there also were differences within Indian Affairs on the form that the permits should take:

> In Alberta, compensation for easements at present is paid in the form of a single initial payment covering severance, inconvenience and damage and there are few cases where provision has been made for additional compensation or the review of compensation. The wording of the Land Section [of Indian Affairs] therefore sets an industry precedent in that it indicates that additional payment will be necessary for the second period without stating what form the payment will take. Our review was intended to enable us to determine if compensation was necessary in the light of conditions then existing. In other words, had the land values greatly increased and was the right-of-way contributing to a greater severance or inconvenience than was originally expected or was it common at that time to pay an annual rent for pipeline easements. Our wording provided all the protection that one could ever wish. The Land Section wording does not give any additional protection to the Band and merely attempts to tell the Branch that additional compensation will be necessary. It is rather incongruous in fact since the arbitrating body could conceivably determine that no additional compensation was necessary and it is obvious that an arbitrating body would be reviewing the conditions in the light of industry procedures at that time.
>
> ...
>
> There is a strong movement afoot amongst landowners in both Saskatchewan and Alberta to force the companies into payment of annual rents for pipeline easements. This may take a few years before this will come into force, however, it was this reasoning that led us to recommend that a routine review with respect to terms of compensation be made.[110]

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[109] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to H.J. Brown, Land Manager, Alberta Gas Trunk Line Company Limited, March 29, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 276).

[110] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, April 5, 1968, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 280–81).

Negotiation of the Right of Way for the 1969 Transmission Line

It was in the context of this heightened attention to the nature of the interests being granted to third parties that the intention to build the 1969 transmission line first arose. Unlike the two earlier power lines, the 1969 line was not intended to distribute electricity to IR 133 or its immediate environs; instead, the line was proposed for the sole purpose of transmitting electricity *across* the reserve from Calgary Power's plant south of the reserve at Wabamun, Alberta, to Slave Lake in the north. The line, providing no direct, ongoing benefit to the First Nation, forms, in the words of counsel, "the main focus of this claim."[111]

In a letter dated February 21, 1968, surveyor C.H. Weir provided Surveyor General Thistlethwaite with a sketch of the approximate location of the proposed line through the reserve through sections 11, 14, 23, and 26 of township 55, range 4, west of the 5th meridian and requested instructions for its survey.[112] According to elder Phillip Cardinal, the land to be traversed by the line was then undeveloped and covered by bush.[113] In a letter dated March 13, 1968, Thistlethwaite advised Weir, among other things, that authority to proceed with the survey was subject to the approval of the Indian Affairs Branch, to be obtained through Turner as District Supervisor in the Edmonton-Hobbema District office.[114]

The approval process was already underway. On March 4, 1968, the Alexis Band Council considered the matter and, according to an account of the meeting in the Edmonton *Journal* of the next day,[115] quickly granted its permission for the line. Signed by Willie Lefthand as Chief and Mike Paul, John Cardinal, and Lawrence Mustus as councillors, the Band Council Resolution stated:

> That an easement be granted to Calgary Power Ltd. for the construction of approximately 13 guyed aluminum tower Power line, under the following terms.
>
> 1. That the sum of one-hundred dollars ($100.) per acre for 100 feet right of way be paid for this easement; which will be approximately 41 acres.

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[111] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 33, Jerome Slavik).

[112] C.H. Weir, Stewart Weir Stewart & Watson, to R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, February 21, 1968, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, p. 266).

[113] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 88, Phillip Cardinal).

[114] R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, to C.H. Weir, Stewart Weir Stewart & Watson, March 13, 1968, Natural Resources Canada, Legal Surveys Division, file SM8209-06646, vol. 1 (ICC Exhibit 10, pp. 269–70).

[115] Alma Keroack, "Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268).

2. That the cleared right of way be one-hundred & fifty (150) feet wide and shall cross sections 11, 14, 23 and 26 TWP 55 Range 4 W5.
3. All clearing shall be done by members of the Alexis Band for $300. per acre for approximately 61 acres.
4. The right of way will be for the construction of a Power line only.
5. This easement to be granted for as long as the right of way is required for the purpose of Power Transmission lines.
6. Land under easement may be used for pasture or agriculture as long as it does not interfere with the lines. Calgary Power to be responsible for any crop or livestock or fire damages resulting from the line operation.[116]

In the *Journal* article, an unidentified official with Indian Affairs applauded the decision-making process by a democratically elected Band Council – described by reporter Alma Keroack as a "fairly recent development" – as "a much better way for these people to govern themselves." He was also quoted as saying: "There are a lot of intelligent men on these reserves, and the policies governing their people are handled much better by an elected band council of interested men."[117] As in the case of the 1959 line and the 1967 extension, the record in this inquiry contains no firm evidence regarding the nature of the discussions between the Band and Calgary Power or the involvement, if any, of Indian Affairs in those discussions. Elder Phillip Cardinal stated that "there was no gathering of any kind by the membership to go over or to view an application that was submitted by anyone, or to vote on like a referendum or anything like that."[118]

Cardinal further testified that J.B. Mustus was the lone dissenting voice on the Band Council as he did not believe the line "would be good for the Band" and would have preferred to have the line go around the reserve rather than across it;[119] other than J.B. Mustus, "nobody really questioned ... what kind of problems [it was] going to create (inaudible) by way of loss of use."[120] None of the elders recalled Indian Affairs providing any appraisal information regarding the value of the land required for the right of way or the costs for

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[116] Alexis Band, Band Council Resolution 1967-68/22774-25, March 4, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 267). For reasons unexplained, the Band Council Resolution refers to Willie Lefthand as Chief whereas the account of the Band Council meeting in the Edmonton *Journal* identifies Moses Kootenay as Chief.

[117] Alma Keroack, "Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis,"Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268).

[118] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 27, Phillip Cardinal).

[119] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 86–87, Phillip Cardinal).

[120] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 23, Phillip Cardinal).

Calgary Power to route the transmission line around the reserve rather than through it.[121] The Band Council did not object to the right of way or the compensation provided because the right of way was perceived as an "opportunity to clear the land by hand" and "make a dollar."[122] Elder Nelson Alexis recalled that, because times were hard and most band members were forced to seek employment off the reserve, the opportunity to earn some money clearing the right of way "was kind of, you know, heaven-sent because we didn't have anything here."[123] But he added:

> I'm not even sure if these people understood what they signed and the weight of it was done. Like, there was – I don't think anybody knew that that even was – you know, that land was going to be lost forever....
>
> I think that if our people understood that there were going to be – you know, this time there's going to be a loss to these – to Calgary Power or whatever power that we have today, you know, they would have probably asked a lot more.[124]

On receipt of a copy of Thistlethwaite's survey instructions to Weir, Indian Affairs' Deputy Administrator of Lands, J.H. MacAdam, forwarded a copy to R.D. Ragan, the Regional Director for Alberta, on March 22, 1968, with a request that the matter be discussed with representatives of both Calgary Power and the Band. Since the instructions provided no details regarding the width of the proposed right of way nor the category of power line (distribution or transmission), it appeared to MacAdam that Thistlethwaite's instructions might relate to the 1959 distribution line for which it had already been determined that no survey was necessary.[125] Ragan apparently passed the inquiry on to the District Office because, on March 29, 1968, A.H. Murray, the Acting Officer in Charge, returned a copy of the March 4, 1968, BCR to Ragan with advice that it related to Calgary Power's "high line from their plant at Wabamun to Slave Lake, Alberta." Recommending approval of the resolution, Murray remarked that "[a]ll accounts paid for the right-of-way and for the brushing are considerably higher than those paid to Non-Indian land owners."[126] Ragan forwarded the resolution to Ottawa on April 3, 1968, adding his own recommendation that it "be approved and that the easement be granted to the Calgary Power Company on the understanding that they will forward a proper survey when the line has been completed."[127]

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[121] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 91 –92, Chief Francis Alexis).

[122] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 23 and 87, Phillip Cardinal).

[123] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 28–29, Nelson Alexis).

[124] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 29 and 92, Nelson Alexis).

[125] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, March 22, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 274).

[126] A.H. Murray, Acting Officer in Charge, Edmonton-Hobbema District, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, March 29, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 275).

On receiving Ragan's memorandum, MacAdam solicited Young's views on April 17, 1968, regarding the right of way, its location, the proposed terms of compensation, and the existing roads and other services crossing IR 133.[128] In his reply of April 24, 1968, Young, who had agreed with Moore and Ragan in February on the advisability of making permits for pipeline rights of way subject to periodic review, identified a number of concerns:

> 1. There is a discrepancy in the figures given in that 41 acres is [sic] required but the Indians are to be paid for clearing 61 acres. No explanation is given.
> 2. We should not grant such an easement under the conditions laid down in Clause 5 of the Band Council Resolution [ie. "for as long as the right of way is required for the purpose of Power transmission lines"]. The Region should provide more substantiation of the rental level and a review clause is needed. Perhaps the circumstances warrant a fairly permanent type of tenure for the line owners. However, there should be an annual rental of at least $5.00 per acre to be reviewed at intervals of not longer than five years, so that we can be assured of fair adjustments to current values and that a bona fide need exists – i.e. that the line is not simply abandoned. We can see no reason why a 20-year term with right to renew and 5-year rental reviews cannot apply here.
> 3. Can provision be made for Indians to derive employment from maintaining the easement clear of brush, etc.
> 4. To what extent and in what ways does this interfere with or affect other facilities on the reserve – eg. roads, etc.
> 5. Does Band now have elect[r]ification and if not, can a deal be made to benefit the Indians re transformer service, etc.[129]

Young's comments were referred for reply to T.A. Turner, by this time the Superintendent in Charge of the Edmonton-Hobbema District. On June 14, 1968, Turner wrote:

> This is to acknowledge your letter of April 24, 1968 and the Regional Director's letter of May 6, 1968. We were finally able to meet with Calgary Power Personnel.

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[127] R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, to Indian Affairs Branch, April 3, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 278–79).

[128] J.H. MacAdam, Deputy Administrator of Lands, Indian Affairs Branch, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, April 17, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 284).

[129] R.G. Young, Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, Indian Affairs Branch, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

> Item #1 – Indians were paid to clear big trees outside the right-of-way where [there] was a danger of them falling on the line.
>
> Item #2 – In Alberta it is a standing practice for all Utility companies, pipe line, etc., to make one payment for easement before work starts and not pay annual rental. This is to be considered as a permanent right-of-way.
>
> Item #3 – In the past, Indians have been hired to keep the right of way cleared of brush.
>
> Item #4 – This right-of-way does not interfere with any other utilities on the reserve.
>
> Item #4 [sic] – The reserve is now electrified.[130]

On September 5, 1968, Young wrote to Ragan to express his views regarding the shortcomings of Turner's response:

> The answer given to Item No. 2 is not satisfactory. The standing practise referred to in Mr. Turner's memorandum must change and, in fact, is changing. Attached are copies of draft agreements being introduced for use under Sections 28 and 53 of the Indian Act and you will note that, while the Agreement assures the Company of use as long as required, the terms and conditions of use are reviewed after twenty years.
>
> Naturally there is some resistance from Companies but they will accept these Agreements. Our responsibility is to protect the Indian interest, and this is not being done when permanent alienation is granted for a fixed sum unless a sale is involved.
>
> ...
>
> Where the easement is to provide access to an oil well on Reserve, etc., the ancillary benefits are a consideration. However, where the purpose is only to convey across a Reserve, there are no ancillary benefits and surfact [sic] values must be fully recognized in the same way as any other surface use.
>
> Would you please discuss this matter with those concerned and advise us of your recommendations.[131]

In voicing these concerns, Young echoed policy issues that had been raised by MacAdam on June 24, 1968, in relation to a proposal to issue a permit under section 28(2) of the *Indian Act* to permit the same transmission line across the Paul Band's Wabamun IR 133A and 133B. Recently promoted to the position of Administrator of Lands, MacAdam had advised Ragan:

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[130] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, Indian Affairs Branch, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, June 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 286).

[131] R.G. Young, Chief, Resources and Industrial Division, Indian Affairs Branch, DIAND, to R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, September 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 292).

> You may be aware that in continuation of its policy to secure the highest return to the Indian people for rights given up in their Reserves, the Branch prefers to approve the grant of rights to use Reserve land for either a short term at a fixed compensation in line with current land values, or for a long term with a sliding scale of compensation to be determined from time to time by negotiation.
>
> The transaction aforesaid [involving the Wabamun reserves of the Paul Band] is an example of the inequitable situation the aforesaid policy endeavours to eliminate. In this case it is proposed to alienate rights to 52.63 additional acres of Reserve land at compensation which is equitable by today's values for a term that for all intents and purposes is forever. What will the value of the rights be in 10, 20 or 30 years from now?
>
> Since the answer to that question is not readily available, but indications are that it will be something in excess of the value today, future Band Councils of future generations of Indians might reasonably be critical of those who were responsible for saddling them with a situation in which they had no voice and over which they can exercise no control.
>
> It would be preferrable [sic], therefore, if either the term of the grant were shortened to some fixed date or that provisions were made for renegotiation of the compensation at specified dates throughout its continuing term.
>
> While it is realized in this instance the Band Council and Calgary Power representatives may be of the opinion that they have concluded the transaction in good faith on the basis of the recommendations of the Band Council Resolutions, I should be pleased if you would advise whether, in your opinion there is any likelihood of reopening the negotiations for the purpose of altering either the term of the agreement or the amount of the compensation, or both. If you are of the opinion that no further negotiation may be initiated, would you provide recommendation to the effect that the circumstances in this particular instance are sufficiently exceptional to warrant the alienation of rights to use 52.63 additional acres of the Reserve for a term which may be construed as "perpetuity" at compensation which equates with present land values?
>
> The grant of future similar rights in Reserves under your direction would be considerably expedited if you would ensure that negotiation of terms and compensation along the lines anticipated by the foregoing were commenced at the initial stages rather than near the end of the transaction.[132]

In the meantime, Weir had completed his survey and forwarded it to Thistlethwaite for review. On August 23, 1968, the Surveyor General circulated the plan to H.T. Vergette of the Lands Surveys and Titles Section, asking about the transaction for which the plan had been prepared and whether the plan was suited for that purpose.[133] MacAdam routed the plan through Ragan on September 9, 1968, asking him to determine its acceptability to local officials and the Band Council and to advise "if there are any locatees['] interests concerned and what the minimum agreed clearance over the Reserve roads will be."[134] Ragan in turn solicited the required information from Turner, who informed him that "[t]his plan was discussed with the Alexis Council on September 30th, and they have approved the plan as presented." Turner had also learned that the Band had no locatees on the reserve and that, although the height of the line would be "a basic distance of 22 feet ... due to the flat terrain of the Alexis Reserve, the line will have a minimum clearance of approximately 26 feet."[135] Ragan returned the plan and Turner's comments to Ottawa on October 30, 1968.[136]

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[132] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, DIAND, to R.D. Ragan, Regional Director – Alberta, Indian Affairs Branch, DIAND, June 24, 1968, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, pp. 287–88).

By November 5, 1968, Vergette's office had already informed Thistlethwaite that the plan appeared suited to the purpose of a proposed long-term permit under section 28(2) of the *Indian Act* and sought a description of the right of way lands.[137] Two days later, MacAdam asked Ragan for his reply to Young's comments of September 5, 1968, "so that the terms of the permit can be clarified."[138] Ragan, relying on the work of his subordinate, E.C. Holmes, crafted his response of November 8, 1968, to address the right of way through the reserves of both of the Alexis and Paul Bands:

> Mr. Holmes agrees that easements for a fixed term with renegotiation of compensation at specific dates are desirable. Such agreements may be more easily negotiated with oil companies as these companies do not foresee a need for certain pipeline easements after oil fields have been depleted. Power transmission lines, on the other

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[133] R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, to H.T. Vergette, Lands Surveys and Titles Section, Indian Affairs Branch, DIAND, August 23, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 299).

[134] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, DIAND, to [R.D. Ragan], Regional Director – Alberta, Indian Affairs Branch, DIAND, September 9, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 295).

[135] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, October 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 296).

[136] R.D. Ragan, Regional Director – Alberta, DIAND, to Indian Affairs Branch, DIAND, October 30, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 297).

[137] H.T. Vergette, Lands Surveys and Titles Section, DIAND, to R. Thistlethwaite, Surveyor General, Department of Energy, Mines and Resources, November 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 299).

[138] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, November 7, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 298).

> hand, are likely to be in place well into the indefinite future and the companies involved may be inclined to resist the concept of short term easements.
>
> When an easement is granted, only some of the rights of ownership are transferred. The value of an easement must, therefore, be something less than the market value of the fee simple. Having determined the value of the easement, injurious affection to the remainder of the property should be evaluated, and additional compensation should be paid accordingly. It is therefore not uncommon for the total compensation to exceed the value of the fee simple.
>
> Some years ago a dispute involving easement compensation was heard by Judge Blackstock in Southern Alberta. He directed that the company should pay compensation in the amount of 150% of the value of the land plus 10%. In his opinion this represented fair compensation for the easement itself and for injurious affection. This formula subsequently became known as the Blackstock formula, and although its existence is often denied, many settlements seem to be based upon it.[139]

After setting forth the particulars of five comparable transactions involving lands with both cultivated and undeveloped components, Ragan continued:

> These sales would indicate a value ranging from $70.00 to $100.00 per acre for cultivated land and $30.00 to $50.00 per acre for undeveloped land. It is interesting to note therefore that if the "Blackstock formula" was to be applied to the easement area of these reserves and having a market value of perhaps $40.00 per acre over most of its course, the compensation would be $66.00 per acre, or considerably less than the company has offered to pay.
>
> It should also be noted that the Right-Of-Way is to be cleared at company cost, and that this will result in increased value. There is nothing to prevent the Indian people from using this land for pasture or other agricultural production.
>
> The power line over most of its course will travel in a due north-south direction and as agricultural fields are usually laid out in this direction, severance and other injurious affection will be minimal.
>
> In Mr. Holmes' opinion the compensation is fully adequate and acceptable.
>
> Should the Indian people or the Branch insist upon a short term and renewable agreement for an easement the company might claim with some justification that
>
> (1) an annual rental based on value should not exceed $3.00 to $5.00 per acre and
>
> (2) at this point in time there is no injurious affection of undeveloped lands.
>
> For the reasons outlined above I am inclined to the opinion that a short term renewable agreement is not in the interest of the Indian people in this particular case. I do believe however, that the agreement should not confer upon the company the right to erect anything more than the one transmission line upon the easement area,

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[139] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to Indian Affairs Branch, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-155 (ICC Exhibit 10, p. 299).

> and that the company should agree to surrender all rights to the area without charge in the event that the easement is not required for the purpose intended.[140]

The same day – November 8, 1968 – Thistlethwaite sent the plan to Vergette for signature under section 43 of the *Canada Lands Surveys Act*. Once this was done, MacAdam returned the plan to Thistlethwaite on November 14, 1968, with a request that two prints be sent to each of himself, Ragan, and Turner. He also reminded Thistlethwaite of the need for a legal description "suitable for insertion in a long term permit under Section 28(2) of the Indian Act."[141]

At this point, Indian Affairs' attention turned to drafting the permit. To this end, Turner met with the Band Council and representatives of Calgary Power to discuss the terms of the proposed document. On December 16, 1968, he reported to Ragan that, in his view, "the agreement ... drawn up by Headquarters for the Paul Band, Wabamun Indian Reserve No. 133A[142] meets with the satisfaction of all concerned." With the exception of the name of the band, the description of the land, and the level of compensation, the Paul Band's agreement, based on section 28(2) of the *Indian Act*, was identical in all material respects to the Alexis 1959 distribution line and 1967 extension permits. Turner continued:

> We have however, been unable to get the Alexis Band Council to say definitely what they feel should be written into a contract such as this.
>
> Since the Municipal Government Act of the Province of Alberta has been amended, we will have to look at some type of tax structure, as these installations will no longer be assessed by the Department of Municipal Affairs, as they belong to an Indian Reserve.
>
> The Band Council had indicated that the agreement should be renewed from time to time, and if the annual rental is agreed upon, it can be adequate to cover the tax assessment and make a one "package deal."[143]

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[140] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to Indian Affairs Branch, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 300).

[141] J.H. MacAdam, Administrator of Lands, DIAND, to R. Thistlethwaite, Surveyor General, Legal Surveys, Department of Energy, Mines and Resources, November 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 302).

[142] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., November 18, 1968, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, pp. 306–9).

[143] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

For Indian Affairs' assistance. Turner attached precedents used by other bands as well as a copy of an agreement used by Calgary Power in non-reserve situations. He suggested that headquarters draw up and forward a draft agreement "so that we can sit down with both Council and Calgary Power officials, and discuss it clause by clause."[144]

Ragan forwarded Turner's memorandum to MacAdam on January 2, 1969, with his own suggestions regarding periodic payments and tax levies:

> I recognize that this request may present you with a problem in view of the indecision on the part of Band Council who indicated their desire for a lump sum settlement by Band Council Resolution No. 1967-68/22774-25. You may, however, have record of agreements made in other regions which would fit the situation here.
>
> I think it only right that the Band Council should levy a tax on property owned by Calgary Power on the reserve, particularly as the Province has vacated the field. Whether or not it is practical to levy such a tax as a form of rental I am not too sure. It might be more equitable to assess the improvements and to establish a mill rate equal to that of the Municipal District or County. You may have some thoughts in this regard.[145]

On January 15, 1969, Thistlethwaite forwarded prints of the plan to MacAdam, Ragan, and Turner,[146] followed two days later by the legal description to be inserted in the permit.[147] The area of the right of way, previously estimated at 41 acres, had been more accurately defined as 42.96 acres, meaning that, at the rate of $100 per acre negotiated by the Band and Calgary Power, the compensation payable for the right of way would amount to $4,296. With this information in hand, MacAdam's office drafted the proposed permit for the Alexis transmission line, using the Paul Band's permit of November 18, 1968, under section 28(2) as a template. However, the initial handwritten draft of the permit incorporated additional provisions not found in the Paul Band's permit – namely, that the lump sum consideration to the Alexis Band of $4,296 would be limited to a period of 20 years, with the consideration for the next 20 years to be agreed upon by the parties or submitted to arbitration.[148]

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[144] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[145] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[146] R. Thistlethwaite, Surveyor General, Legal Surveys, Department of Energy, Mines and Resources, to J.H. MacAdam, Administrator of Lands, DIAND, January 15, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 302).

[147] R. Thistlethwaite, Surveyor General, Legal Surveys, Department of Energy, Mines and Resources, to J.H. MacAdam, Administrator of Lands, DIAND, January 17, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 317–19).

An official in MacAdam's office, R.J. Pennefather, prepared a draft memorandum originally intended to be forwarded over MacAdam's signature to Ragan with the permit to discuss the reasons behind these revisions. Although it is not clear whether the draft memorandum or the proposed permit were ever delivered, Pennefather's comments are of interest:

> In view of the general desire for maximum revenue by the Band, and security of tenure on the part of the applicant, I have followed the standard practice now prevailing in relation to oil pipeline agreements in Alberta in preparing the suggested terms and tenure included in this draft agreement.
>
> While taxation is entirely out of my purview, it is my responsibility to assure that (a) maximum revenue to the Band in the short run together with, (b) provision for review at reasonable intervals of the compensation payable, are included in the Agreement. The revenue factor bears no relation to taxation by the Band Council in order to raise revenue for authorized municipal administration costs. This is the essential point in regards to the Agreement; that insofar as compensation for rental of the land is concerned, the entire agreed upon consideration shall form part of the agreement and be fully detailed within it. As regards the normal capital and operating costs for municipal services provided by the Band, I am sure that the Company would and should assume its fairly assessed and taxed share. In this respect you will note Point Two of the attached draft Agreement which makes the Permittee liable for payment of municipal taxes.
>
> If the Band Council wish to consider a change in the terms of the attached agreement they will be carefully considered in view of the lack of a more specific consensus in their comments to date. Should the Band Council require changes or modifications in the terms of the Agreement let me know at your earliest convenience, providing your comments.[149]

Neither the draft permit nor a further typewritten version[150] was executed. Instead, MacAdam penned a revised memo to Ragan on April 9, 1969:

> Further to your memo of January 2, 1969, and enclosures, I may inform that the legal description of the lands for the right-of-way has now been received. As you are

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[148] Draft Agreement between Her Majesty the Queen, Represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., ca. January 17, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 306–9).

[149] Draft memorandum from J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, undated, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 472).

[150] Draft Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., ca. January 18, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 310–12).

> aware, we now have to apply for an Order in Council authorizing the grant of the right-of-way. When obtained, a draft agreement will be prepared for execution by Calgary Power. The terms will be for as long as required for the lump sum of $4,296.00.
>
> It is my responsibility that maximum revenue be obtained for the Band. The lump sum consideration in this case is in line with your strong recommendation in the last paragraph of your letter of November 8, 1968 (your File 774/31-3).
>
> The aforesaid consideration bears no relation to taxation by the Band Council in order to raise revenue for authorized municipal administration costs. You must be aware that Clause No. 2 of Agreements issued in such a case provides as follows:
>
> > "That the Permittee should pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable in respect to the said lands or the Permittee's use thereof."
>
> I have reason to believe the Power Company, while having negotiated in good faith, is not expecting that at a later date, it should have to pay taxes levied by the Band Council in addition to the compensation moneys already agreed upon. It may well be that in this expectancy, the Company would have altered substantially its offer on a per acre basis.
>
> In any event, the matter of taxation in general surely deserves further serious consideration. I believe it could be part of the preliminary negotiations for a transaction of this nature.
>
> As to the type of agreement to be drafted in this case (Alexis I.R. No. 133) it should be similar mutatis mutandis to the one drawn up for Sturgeon Lake I.R. No. 154 (your file 77/31-3).[151]

As the PHI report notes, MacAdam appeared to take no notice of Turner's December 16, 1968, request for a draft agreement that he could discuss with the Band and representatives of Calgary Power, nor did he offer any explanation of "why an Order in Council was now required to effect the easement rather than a permit under Section 28(2) of the *Indian Act*."[152] His memorandum to Ragan also differed materially in several respects from the draft prepared by Pennefather, as the PHI report notes:

> In the first place, the letter, which was to have been signed by MacAdam in his capacity as Administrator of Lands, suggests that taxation was an issue about which IAB [Indian Affairs Branch] officials in the Lands office knew very little. Secondly, in the final version of the letter MacAdam stated that it was his "responsibility that maximum revenue be obtained for the Band," whereas in the draft the responsibilities are stated

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[151] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

[152] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 19 (ICC Exhibit 6, p. 19).

> to be maximum revenue to the Band in the short run and a provision for periodic review of the compensation. Thirdly, in the final version of his letter MacAdam discouraged the suggestion that the Band could or might tax CPL [Calgary Power] whereas in the draft text the view expressed is that the Company "would and should assume its fairly assessed and taxed share."[153]

Indian Affairs Reconsiders Its Policy for Utility Rights of Way

During this time, some of the close scrutiny that had been given by officials in Indian Affairs to the long-term interests in the oil and gas industry was being directed to a greater degree at the easements granted to utility corporations. On May 9, 1969, C.T.W. Hyslop, Assistant Director of the Indian-Eskimo Economic Development Branch, provided his immediate superior, J.W. Churchman, with a draft letter for circulation to regional directors across Canada soliciting their comments to assist in formulating a policy. In his covering memorandum, Hyslop wrote:

> To the extent that lands affected by Easements granted for "as long as required" in consideration of compensation paid in a lump sum calculated on the basis of current land values are no longer available for use by the beneficial owners of such lands, the current Departmental practice to grant easements to public utility corporations, is inconsistent with the Departmental policy of no sale or alienation of Indian reserve lands.
>
> In this connection it is desirable to examine current practices concerning the grant of easements to use and occupy Indian reserve lands, with a view to achieving closer adherence to that policy.
>
> It seems likely that any provision for substantial change in the form of easements over Indian reserve lands from those pertaining to non-Reserve lands will meet with serious objection by such corporations, and possibly from the Indians.[154]

Three days later, Churchman circulated to the regional directors a letter incorporating Hyslop's first paragraph and adding:

> The Department intends to examine its current practices concerning the granting of long term easements to public utility corporations to use and occupy parts of Indian reserves for major transmission facilities. Initially the examination will concern itself with transmission facilities which pass through Indian reserves incidental to the provision of services to some point outside the Reserve's boundaries. The examination will

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[153] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 21 (ICC Exhibit 6, p. 21).

[154] C.T.W. Hyslop, Assistant Director, Indian-Eskimo Economic Development Branch, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, May 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 323).

> be directed toward formulation of a policy applicable to all Indian reservation lands, which adheres more closely to the present policy concerning no sale or alienation of Reserve lands, than present procedures do.
>
> ...
>
> An easement for a major transmission facility granted for a term "as long as required" but requiring renegotiation of the compensation at intervals not exceeding 20 years, would be more in keeping with the Departmental policy than those granted by the present practice.
>
> It is noted that one or two Band Councils within recent months have negotiated easements for Electrical power transmission lines on a rental review basis. The practice however, is not widespread, and available information is insufficient to determine what effect adoption of a general policy requirement along such lines, would have on Indian reserves in your Region, as well as public utility corporations in the area.
>
> Your comments and recommendations in this respect, concerning all public utilities, i.e. Gas, Oil and Water pipelines; Electrical Transmission Lines; Telephone Trunk Lines; and Radar and Radio Tower installations, are invited.
>
> I should be pleased if your comments could range over as many aspects of the problem as you consider are pertinent to the formulation of a viable policy.[155]

Over the next several months, various officials within Indian Affairs responded to Churchman's letter with comments on how utility rights of way had affected reserves and ideas on how agreements with utility companies might be improved:

- Compensation should be paid annually rather than in a single lump sum.[156] Alternatively, according to E.A. Moore, the Supervisor of Indian Minerals, "the initial lump sum should be high enough to reflect [a] reasonable return for the period in question in addition to damage, severence [sic], inconvenience, etc."[157]

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[155] J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Directors, Indian Affairs Branch, DIAND, May 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 324–25).

[156] E.A. Moore, Supervisor of Indian Minerals, Indian Affairs Branch, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34); F.R. Butchart, Superintendent, Parry Sound Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Superintendent, Economic Development, Ontario, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 344).

[157] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28).

- Utility companies had secured easements too easily without paying fairly for the inconvenience caused by their installations – including interference with buildings being constructed on some sites, property being "defaced," interference with cultivation, and wide clearings on woodland and forest areas – which had resulted in diminished values.[158]
- Rights of way could be issued for lengthy terms, and indeed in perpetuity if required, subject to provision being made for periodic reviews of compensation.[159]
- "[T]o accurately reflect the changes in land and money values," the recommended maximum length of a term without a review was 20 years,[160] with most suggesting reviews every 10 years[161] and some proposing reviews

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[158] S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34); F.B. McKinnon, Regional Director – Maritime Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 343); F.A. Clark, Regional Director – British Columbia-Yukon Region, Indian Affairs Branch, DIAND, to Acting Director, Indian-Eskimo Economic Development Branch, DIAND, September 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 357–58).

[159] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, Indian Affairs Branch, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42); L. Morisset, Acting Chief, Economic Development, Quebec Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 25, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 354–55); F.A. Clark, Regional Director – British Columbia-Yukon Region, DIAND, to Acting Director, Indian-Eskimo Economic Development Branch, DIAND, September 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 357–58).

[160] A.G. Moore, Superintendent, Peterborough Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, July 14, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 349).

[161] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); J.G. McGilp, Regional Director – Ontario, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 337); F.R. Butchart, Superintendent, Parry Sound Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 344); R.W. Readman, Superintendent, Simcoe Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, July 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 346); A.J. Soney, Superintendent, Christian Island Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 8, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 347); A.D. Cameron, Superintendent, Bruce Indian Agency, DIAND, to [V.M Gran, Acting] Regional Director, Economic Development, Ontario, DIAND, July 15, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 350); D. Greyeyes, Superintendent, Kenora Indian Agency, DIAND, to V.M. Gran, Acting Regional Superintendent, Economic Development, Ontario, DIAND, July 16, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 351).

every five years.[162] Alternatively, the length of the term might be varied "depending on the purpose for which the easement or lease is granted."[163]

- "[T]o reduce the conflict of re-negotiation, ... the payments [should] be tied to some index such as the cost of living, land values, etc."[164]
- The agreements should provide for arbitration in the event that the parties were unable to agree on the rent for the ensuing term at the time of rent review.[165]
- Where the sole purpose of the utility company's installation on a reserve was to benefit the residents of that reserve, the required easement should be granted without charge to the company because (a) the charge would simply be passed on to the consumers on the reserve in any event, and (b) "where the government is paying full costs of installation it would be unrealistic to ask the government to compensate the people for services they were receiving."[166] According to F.A.Clark, the Regional Director for Saskatchewan, "[t]his is particularly true in the case of reserves in remote areas."[167]

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[162] F.A. Clark, Regional Director – Saskatchewan, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 13, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 339–40); D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42); F.B. McKinnon, Regional Director – Maritime Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 343).

[163] L. Morisset, Acting Chief, Economic Development, Quebec Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 25, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 354–55).

[164] D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42).

[165] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28); F.R. Butchart, Superintendent, Parry Sound Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 344).

[166] S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34).

[167] F.A. Clark, Regional Director – Saskatchewan, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 13, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 339–40).

- The easement should be cancelled and the land within the right of way should be returned to the Band when the land ceases to be required for the purpose for which it was acquired.[168]
- Where a Band's use of reserve lands is effectively terminated by the installation of a utility company's works, those lands should be exchanged for other land or the utility company should place Indian Affairs in funds to purchase land, with the exchanged or purchased land subsequently constituted as new reserves.[169]
- The Band should be permitted to relocate the right of way and the works within it at the company's expense, or the lease should be subject to renegotiation, if it is later found that the existing location adversely affects development of the reserve.[170]
- Small reserves should be entirely avoided by utility companies unless the utility is intended to serve the reserve community in passing.[171]
- Bands in Ontario's Peterborough Indian Agency were of the view that they would permit no further easements on their reserves.[172]

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[168] J.G. McGilp, Regional Director – Ontario, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 337); R.W. Readman, Superintendent, Simcoe Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 346); A.J. Soney, Superintendent, Christian Island Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 8, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 347); D. Greyeyes, Superintendent, Kenora Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 16, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 351).

[169] D.R. Cassie, Superintendent, Six Nations Agency, DIAND, to V.M. Gran, Acting Regional Director, Economic Development, Ontario, Indian Affairs Branch, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42); F.B. McKinnon, Regional Director – Maritime Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 19, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 343).

[170] J.G. McGilp, Regional Director – Ontario, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 337); A.J. Soney, Superintendent, Christian Island Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 8, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 347); A.D. Cameron, Superintendent, Bruce Indian Agency, DIAND, to Acting Regional Superintendent, Economic Development, DIAND, July 15, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 350); L. Morisset, Acting Chief, Economic Development, Quebec Regional Office, DIAND, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, June 25, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 354–55); F.A. Clark, Regional Director – British Columbia-Yukon Region, DIAND, to Acting Director, Indian-Eskimo Economic Development Branch, DIAND, September 9, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 357–58).

[171] V.M. Gran, Acting Regional Superintendent, Economic Development, Ontario, to [J.W. Churchman], Director, Indian-Eskimo Economic Development Branch, DIAND, July 21, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 353).

[172] A.G. Moore, Superintendent, Peterborough Indian Agency, DIAND, to [V.M. Gran, Acting] Regional Director, Ontario, DIAND, July 14, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 349).

In underscoring the need for periodic renegotiations of rent, S.C. Knapp, the Regional Superintendent of Development for Manitoba, added:

> The argument that you pay for the pole once and for all does not truly compensate the farmer for the inconvenience that pole will cause him for the next twenty years. ...
>
> These are long-term inconveniences which are certainly never fully compensated for by paying $10. to $15. per pole. With large transmission lines the problem becomes even more accentuated because of the erection of towers. It is my feeling that utility companies have misinterpreted their rights by assuming that everything they were doing was for the good of the public. They have often neglected to realize that what was good for the public was also good business for them and sometimes an inconvenience for the individual land holder.
>
> As the inconvenience continues as long as the transmission line is there, the cost of the inconvenience will escalate according to the cost of living and inflationary trends in the area. ...[173]

D.R. Cassie, the Superintendent of the Six Nations Indian Agency, advised his superiors that he eagerly anticipated the development of a general policy which he was sure "would be beneficial to Indian bands who are often in a weak position when it comes to negotiating with these large and well-established companies"; he highlighted the superior bargaining position of the utility companies when he noted that they would, "no doubt, ... bear in mind the possibility of going around reserve lands, rather than through them, if the terms are not agreeable."[174] Conversely, A.D. Cameron, Cassie's counterpart at the Bruce Indian Agency, believed that bands should be responsible for their own negotiations with the utility companies and that Indian Affairs "should only be called upon by the Band Council to give Legal Advice and to draw up the necessary documents."[175]

E.A. Moore, the Supervisor of Indian Minerals, provided specific comments regarding the impact of changes in the municipal taxation scheme in Alberta:

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[173] S.C. Knapp, Regional Superintendent of Development – Manitoba, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, June 2, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 333–34).

[174] D.R. Cassie, Superintendent, Six Nations Indian Agency, DIAND, to V.M. Gran, [Acting] Regional Director, Economic Development, Ontario, DIAND, June 18, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 341–42).

[175] A.D. Cameron, Superintendent, Bruce Indian Agency, DIAND, to Acting Regional Superintendent, Economic Development, DIAND, July 15, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 350).

> Special consideration should be given in Alberta respecting the taxation status of the Bands now that it would appear that taxes derived from industrial development will go to Band funds rather than the municipality. This will make development on Reserves more desirable than in the past.[176]

As the PHI report suggests, the "weakest endorsement"[177] of Churchman's proposed policy change came from R.M. Sutherland, the Acting Regional Director for Alberta, who stated:

> I agree that it would be desirable to negotiate easements on a rental review basis, and this is apparently being accomplished insofar as oil and gas pipelines are concerned. I have no knowledge of any instances where negotiations on this basis have been carried out with power utility companies in Alberta. I suspect however that some of these companies such as Calgary Power Limited might object strongly to any clause providing for the periodic review of compensation. Should any difference in attitude exist, it might be attributed to the probability that an electric transmission line will remain in place in perpetuity while the continued need for oil and gas pipelines is more easily predicted. Thus an oil company is less likely to object to a review of compensation at the end of a twenty year period if the company believes that it will have no use for the pipeline beyond the twenty year period. The typical power transmission company, not being dependant [sic]on a depleted resource, is more likely to be interested in the outright purchase of the rights conveyed in the easement.
>
> Compensations paid in recent years for easements to Public Utility Corporations have normally exceeded the market value of the lands affected, and it would be reasonable to assume that any excess paid over and above the value of the easement is designed to compensate for injurious affection to lands outside the area of the easement itself. Where little or no use is being made of the land adjacent to the easement area it is difficult if not impossible to establish that there is any injurious affection at the present time. For this reason the compensation offered in lump sum often seems generous even though changing land use might in the future render the settlement less attractive. The point is that band councils might still prefer to accept what appears to be a generous lump sum settlement in preference to an annual rental which in the early stages might be relatively low because of the present absence of injurious affection.
>
> I have noted with interest your statement that several band councils within recent months have negotiated easements for Electric Power Transmission Lines on a rental review basis. It would be of interest to know how that compensation compared with any lump sum compensation paid for easements on non-Indian lands adjacent to those same reserves. ...

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[176] E.A. Moore, Supervisor of Indian Minerals, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, May 26, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 327–28).

[177] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999 (ICC Exhibit 6, p. 29).

> Finally I would draw your attention, as Mr. E.A. Moore has done, to the fact that municipalities in Alberta have discontinued the practise of taxing non-Indian interests on Indian reserves. Band Councils representing band populations are or could be the taxing authorities as well as the effective owners of the land. Public Utility Corporations therefore should clearly understand that any rentals payable with respect to easements should not in any way affect the power of the band councils to tax the interests of those companies on the reserves.[178]

The Transition Period

As the responses to Churchman's policy initiative arrived in Ottawa and Indian Affairs considered its options, questions arose as to how negotiations that were already underway should be handled. On a June 6, 1969, inquiry from H.T. Vergette, at that time the Acting Chief of the Lands Division, Hyslop noted in the margin:

> In this case where the Region has already entered into negotiation with the Company with the consent of the Band Councils on a non-renegotiable basis I do not think that we should make any changes in agreements already approved or under negotiation at time of writing as per Mr. Boys letter.[179]

In August, Hyslop directed a more formal memorandum to Vergette:

> As you are aware there are strong arguments which can be put forward to support arrangements which give utility companies rights-of-way in perpetuity for a lump sum payment. On the other hand there are equally strong and valid arguments to support the land owners['] claim for re-negotiation of compensation at fixed intervals.
>
> It has been the Department's recent policy I understand not to alienate land for long periods of time either by lease, easement, permit, right-of-way or other occupation without opportunity for renegotiation of compensation. This I believe is viewed as part of the trust function where resistance is given for the most part to alienation by fee simple or otherwise unless the land use is clearly in the public interest as for instance in the case of public roads or highways where the Indian reserve lands benefit from such alienation.
>
> Until the proposed new land policy being prepared by Mr. Joubert is accepted I suggest that we continue to administer Indian lands in the same manner as we have in the recent past, i.e. getting the best possible terms for the Indians. I realize that this will not be popular with utility companies who are quite used to negotiating with non-

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[178] R.M. Sutherland, Acting Regional Director – Alberta, DIAND, to J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, May 28, 1969, Federal Records Centre, DIAND, file 1/311, vol. 2 (ICC Exhibit 10, pp. 330–31).

[179] Handwritten marginal note from [C.T.W. Hyslop], Assistant Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, on letter of June 6, 1969, from Vergette to [Hyslop], Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 336).

> Indians in quite a different way. However, when we have clarification of the proposed policy and new land act the whole matter of land alienation should be gone into thoroughly and the practice of granting of easements to public utility corporations should be thoroughly investigated in so far as provincial practice is concerned. We will at that time then be in a better position to recommend on future policy in so far as Indians are concerned.[180]

While the decision regarding government policy was pending in mid-1969, MacAdam wrote to Ragan to determine whether he still maintained that the transaction between the Alexis Band and Calgary Power should proceed on the basis of a single lump sum payment as outlined in the Band Council Resolution of March 4, 1968:

> You will recall that a few weeks ago, a memorandum was sent to all Regional Directors considering a change in the Departmental policy on the issuance of long-term permits for transmission line purposes. I understand you have already submitted your views and comments on this subject.
>
> However, in dealing with this particular case involving Alexis Indian Reserve No. 133, we would like to know if you still strongly recommend that the permit to issue in this case be for as long as required for the lump sum of $4,296.00....[181]

The Assistant Regional Director for Alberta, M.G. Jutras, responded on Ragan's behalf on July 9, 1969:

> In reply to your memorandum of June 23, 1969, concerning the above-named Right-of-Way Permit, this will confirm that we still recommend that this permit be issued for as long as required for the lump sum of $4,296.00. This is in accordance with the Band Council's wishes and further substantiated by our previous covering memo on the subject.[182]

On the basis of this recommendation, on September 23, 1969, Jean Chrétien, at that time the Minister of Indian Affairs and Northern Development, counselled the Governor General in Council to grant an easement to Calgary Power across IR 133 "for so long as such easement is required for electric power transmission line purposes."[183] Perhaps more interesting is the fact that the recommendation provided for the easement to be granted pursuant to section 35 of the *Indian Act*, with the consent of the Governor General in Council to Calgary Power's exercise of its statutory powers of expropriation, rather than under section 28(2) as had been the case with the 1959 distribution line and the 1967 extension. The Minister's recommendation was forwarded to the Privy Council on September 24, 1969.[184]

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[180] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, August 11, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 356).

[181] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, June 23, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 345).

[182] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

The New Policy

That same day, Hyslop advised the regional directors of the department's new policy regarding the granting of rights of way for electrical transmission lines across Indian reserves:

> Basic to the policy to be followed in granting easements for electric power transmission lines, pipe lines, etc., for a term "as long as required" will be the provision for a review of compensation at least every twenty (20) years. This is the maximum time which may elapse between reviews and attempts should be made wherever possible to negotiate for shorter review periods.
>
> In negotiations with public utilities, pipeline companies, telephone companies, etc., the following points should be borne in mind:
>
> (a) [...]
>
> (b) Adverse effects on future development of the Reserve. There are several examples of relatively small Reserves which have been rendered virtually useless by the multiplicity of easements and rights-of-way for various purposes. It is most important, therefore, that when major easements or rights-of-way are being negotiated that advice and comment be obtained from development and land use personnel and that this advice be made available to the Band Council involved.
>
> (c) Attitude of Band Councils. In many cases the Band Council may view the situation simply as a matter of a large payment now as opposed to a smaller payment now with a possible further payment at some later date. It is the responsibility of the staff to explain the long term advantages of being able to re-negotiate rentals.
>
> Where final agreement has been reached between Band Council and applicant companies or where negotiations are almost complete on the basis of a "one-and-for-all" payment, we will be unable to refuse these agreements entered into in good faith. It is important, however, to ensure that all of your staff, both in your office and in the

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[183] Jean Chrétien, Minister of Indian Affairs and Northern Development, to Governor General in Council, September 23, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 359–60).

[184] Indian-Eskimo Economic Development Branch, "Précis for the Clerk of the Privy Council," September 15, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 361).

> District offices be made aware of the Department's attitude toward all new applications.[185]

Apparently considering itself governed in this case by the last paragraph of Hyslop's policy, the government granted approval of the right of way across IR 133 by Order in Council dated October 1, 1969.[186]

Eight days later, MacAdam forwarded four copies of a draft permit to Ragan for execution by Calgary Power. Noting that the department had no record of having received the payment of $4,296 at $100 per acre for the 42.96 acres in the right of way, MacAdam asked Ragan that, "when presenting this permit for execution, you request the permittee to remit the aforesaid sum with the executed copies."[187] Ragan directed the permits to Calgary Power through the Edmonton-Hobbema District office, and Calgary Power's Land Agent, S.C. Johnson, returned all four signed copies, together with the company's cheque for $4,296, on December 30, 1969.[188] Acting District Supervisor I.F. Kirkby arranged for the cheque's deposit with the Receiver General on January 5, 1970,[189] and forwarded the permits to MacAdam the following day.[190] Following their execution by the department, MacAdam returned two copies of the permit to Kirkby on January 14, 1970, for his file and distribution to Calgary Power.[191] The permit was registered in the Indian Land Registry on January 15, 1970, as instrument 16083.[192]

The permit provided that, in consideration of the sum of $4,296 paid by Calgary Power, the Minister granted the company, "for such period as the said lands are required for a right-of-way for power transmission line purposes," the right "to construct, erect, operate and maintain towers and poles with anchors, guy wires, brackets, crossarms, insulators, transformers, and their several attachments and to string one or more lines of wire for the transmission and distribution of electric energy and for communication purposes." In addition to being permitted to enter on the reserve from time to time as required to maintain its works, subject to the obligation to pay compensation for any loss or damage suffered by the Band or locatees by reason of its entry on and use of the reserve, Calgary Power acquired the right "to clear the right-of-way and keep it cleared of all or any part of any trees, growth, buildings or obstructions now or hereafter on the right-of-way which might, in the opinion of [Calgary Power], interfere with or endanger the construction, erection, operation, maintenance or stringing of the works or any part thereof." This right extended to trimming or cutting down trees on IR 133 outside the right of way which, in Calgary Power's opinion, "might in falling or otherwise endanger the works or any part thereof." The permit also included a term similar to the taxation provision in the 1959 and 1967 permits:

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[185] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Directors, DIAND, September 24, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 362–63).

[186] Order in Council PC 1969-1884, October 1, 1969, DIAND, Indian Land Registry, Registration No. 14169 (ICC Exhibit 10, pp. 365–68).

[187] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, October 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 373).

[188] S.C. Johnson, Land Agent, Calgary Power Ltd., to Edmonton-Hobbema District Office, DIAND, December 30, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 375).

[189] DIAND, Receipt Voucher, January 5, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133, vol. 2 (ICC Exhibit 10, p. 383).

[190] I.F. Kirkby, Acting District Supervisor, Edmonton-Hobbema District, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 6, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 384).

[191] J.H. MacAdam, Administrator of Lands, DIAND, to [I.F. Kirkby], Acting District Supervisor, Edmonton-Hobbema District, DIAND, January 14, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 385).

[192] Registrar, Indian Land Registry, DIAND, "Application to Register an Instrument," January 15, 1970, Federal Records Centre, DIAND, file 774/31-3-2-133, vol. 2 (ICC Exhibit 10, p. 386).

> 1. That the Grantee shall pay all charges, taxes, rates and assessments whatsoever payable by the Grantee or any occupant of the right-of-way which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the works or the use by the Grantee of the right-of-way.[193]

The permit made no reference to clauses 3 and 6 of the March 4, 1968, Band Council Resolution under which band members were to be paid at the rate of $300 per acre to clear 61 acres of land and were to be permitted to use the right of way "for pasture or agriculture as long as it does not interfere with the lines." With regard to the clearing fee, the SCW report of April 29, 1996, notes that, "[a]s this fee would have been paid directly to Band members, no record of the financial benefit is found in the Departmental files."[194] However, at the community session on December 5, 2001, elder Howard Mustus stated:

> We want to clarify that there was no compensation. What our people did was work for that benefit [the clearing fee]. There was no compensation. Let's get that clear. The blocks as was dictated to by Indian Affairs, you drew a number and the blocks

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[193] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., October 1, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 369–72).

[194] "Alexis Powerline Easement Claim," prepared at the request of Specific Claims West, April 29, 1996 (ICC Exhibit 4, p. 20).

> were numbered. That's what you got. So you worked and cleared that block, and it was worth $250 [sic], and that was the going rate for – based on acres that we cleared in the place. So as far as compensation is concerned, there is no compensation. The resources that our people obtained was for the work that they done clearing the right-of-way.[195]

In addressing the clearing fee payable in relation to the right of way for the 1969 transmission line, elder Phillip Cardinal also remarked:

> Again, according to my memory, I do remember that when those parcels of lands that we referred to this morning that were divvied out to the Band members, to each family, I believe it was half acre each or something like that, the payment was made in cash. I believe the cash was brought out – I don't know about the cash. The Chief at the time made the payments in cash, and that's all I remember. I don't remember any other payments whether it [was] by cheque or any other way, money order or whatever, paid towards the Band's account anywhere. I can't recall that.[196]

From this testimony it seems evident that band members cleared the right of way and were paid for doing so. It is also evident, however, that band members were paid only for the initial clearing and were not hired to keep the right of way clear of new growth. Chief Francis Alexis remarked that, although underbrush grew quickly on the right of way and the Band would have welcomed the work, Calgary Power proceeded without consulting the Band to scrape and spray the right of way using machinery to get rid of the new growth. This, stated Chief Alexis, deprived band members of opportunities to earn income.[197]

Phillip Cardinal added that the spraying made them reluctant to use the right of way:

> And the other thing was that we couldn't even take advantage of cutting and gathering the regrowth and stuff like that because he came by, and without even asking our – without getting any consent from the leadership, they went ahead and sprayed it and we don't even know what they sprayed it with. It might have been, you know, the chemicals they use to spray the roads with. We don't know what they – you know, those might be cancer-causing agents they might have used, we don't know that. And nobody mentioned that to us like Indian Affairs, I mean, who are supposed to be responsible for what the (inaudible) certain obligations that are complied with, and

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[195] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 35, Howard Mustus).
[196] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 58–59, Phillip Cardinal).
[197] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 67, Chief Francis Alexis).

> I guess obviously not protecting the land that's supposed to have been set aside for our use, I guess.[198]

When asked whether any band members had attempted to carry on farming activities on the right of way after the transmission line was built, Chief Alexis added:

> Some people tried to use it but, like I said, were scared.... And they [Calgary Power] scraped the – right from one end of the Reserve to the other under the transmission line so it would kill the plants and then the trees and then everything. I don't know anybody who would want to plant a garden or something there after we don't know what was sprayed here because we'd need a report.[199]

Howard Mustus identified another reason why, despite Indian Affairs' assumption that the Band would benefit from being able to use newly cleared lands within the right of way for agricultural and other purposes, that benefit was not realized:

> Today the land underlying the high-voltage transmission line as we've referred to is (inaudible). There's no utilization, we can't use it for anything. People in the past attempted to try and build close to it, but they – there was always the interference, you know, in their electrical appliances and that type of thing. And it created a situation for us in the community and our planning. It's a restricted core area.[200]

Chief Alexis added:

> Our people have not utilized the land since that transmission line has been put there because a few years back I think there was big talk about the electromagnetic radiation from transmission lines, that it has some kind of impact on people's health and well-being, and a lot of people are scared to use that line for anything else.[201]

Nelson Alexis further elaborated on the practical difficulties that the transmission line had imposed on the reserve:

> You know, this land that we're talking about here, the narrow – we call it the narrow because it comes to a narrow part of the lake here.

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[198] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 68–69, Phillip Cardinal).
[199] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 90, Chief Francis Alexis).
[200] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 40, Howard Mustus).
[201] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 89, Chief Francis Alexis).

> But this land that we're talking about is probably one of the, you know, the best lands in this whole – you know, this part of the country. We – all along this lake we have recreational, you know, summer recreational uses for this lake and we have prime lands here. And you know what? That power, this power line goes right through that. It splits that thing right in half.[202]

Chief Francis Alexis concurred:

> But today I think we can identify a whole bunch of uses, but because of transmission line being there, we can't. We have to compromise our infrastructure, our capital value here, our subdivisions, our core area, and sometimes even some of our plans have to be altered because of our transmission lines.[203]

INTRODUCTION OF PROPERTY ASSESSMENT AND TAXES ON IR 133

The permits relating to all three power lines on IR 133 provided that Calgary Power would "pay all charges, taxes, rates and assessments whatsoever ... which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable" with respect to the lines or the company's use of the right of way lands. Clearly, the permits contemplated property taxes, but when the transmission line was installed in 1969 the Alexis First Nation knew nothing about taxation or adopting a property tax bylaw. In the words of Chief Alexis:

> I don't remember anybody talking about taxation or taxation bylaw. Just recently, in the '80s I think, we come to understand taxes, and we've – in the '90s we're try [sic] to develop our own taxation bylaw and it took us about almost ten years to get it into place. It was done just recently, but it was started a long time ago.
>
> But at that time [in 1969] I don't think there was an understanding of taxes or anything because we were supposed to be tax exempt....
>
> [W]e didn't even have policies then let alone taxation bylaws. I mean, you know, we were just beginning to learn how to govern, you know, ourselves your way. And I say "your way" because we always governed ourselves our way before that.
>
> And we didn't have anything on paper at that time. And taxation, you talk about taxation, you know, in that time would be completely out of the question.[204]

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[202] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 31, Nelson Alexis).
[203] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 89–90, Chief Francis Alexis).
[204] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 54, Chief Francis Alexis).

As we have already seen, the First Nation approached TransAlta in 1995 with a view to levying retroactive annual charges on the company's use of the lands.[205] TransAlta rebuffed the First Nation's efforts to impose additional charges and, although the company was prepared to consider paying taxes or to make payments in lieu of taxes, it refused to do so on a retroactive basis.[206]

Phillip Cardinal spoke of the Band being advised in the late 1970s and in the 1980s by officials of Indian Affairs "to get a bylaw in place" because, as long as it failed to do so, the municipality had the right to assess and tax property on the reserve. He also recalled TransAlta's representatives stating that they had been paying property taxes to the municipality, although they did not indicate the quantum of taxes paid.[207] However, Chief Alexis testified that the First Nation did not learn of its taxation authority until more recently through its legal counsel,[208] and finally implemented a bylaw in 1997, which was submitted to Ottawa and given ministerial approval in 1998 or 1999.[209] According to Howard Mustus, it is the First Nation's understanding that each of the three power line rights of way is subject to the bylaw but the taxation power "is not retroactively enforceable."[210]

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[205] Alexis First Nation, Band Council Resolution 95-96/133-3-6-20, September 19, 1995 (ICC Exhibit 1, pp. 38–39).

[206] Wolfgang Janke, Vice President, Customer Services, TransAlta Utilities Corporation, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, October 23, 1995 (ICC Exhibit 2, pp. 3–4).

[207] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 69, Phillip Cardinal).

[208] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 56, Chief Francis Alexis).

[209] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 77, Chief Francis Alexis). The Alexis First Nation Property Tax By-Law, dated July 27, 1999, is on the record in this inquiry as Exhibit 13 but, based on Chief Alexis's evidence, it is not clear whether this is the original bylaw enacted by the First Nation.

[210] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 79, Howard Mustus).

PART III

ISSUES

The parties proceeded on the basis of two main issues drafted by Commission counsel following a planning conference on July 28, 2000. In order to analyze these issues, we shall address a number of questions about statutory and/or fiduciary duties that may have been owed to the Alexis Band, as they have been identified by the First Nation or Canada in their submissions.

The issues to be addressed in this report, therefore, are as follows:

1 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligations, if any, to the Alexis Band in the manner in which the Department granted a section 28(2) permit and a section 35 right of way to Calgary Power to construct power utility lines in 1959, 1967, and 1969?

In order to answer the above question, it is necessary to ask whether the Crown owed the following duties to the Alexis Band and if so, if it breached its duty.

(a) Was there a duty to obtain fair and reasonable compensation for the 1959 and 1967 distribution lines? If so, was that duty breached?

(b) Was there a duty to advise the Band of the relative strength of its bargaining position with Calgary Power in the negotiations for the 1969 transmission line and to keep the Band informed? If so, was that duty breached?

(c) Was there a duty to obtain an independent appraisal of the fair market value of the land to be expropriated for the 1969 line and advise the Band accordingly? If so, was that duty breached?

2 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligation to the Band by failing to obtain a reasonable annual fee, rental, or charge as permitted in agreements between DIAND and Calgary Power?

In order to answer the above question, it is necessary to ask whether the Crown owed the following duties to the Alexis Band and, if so, if it breached its duty.

(a) Did the Crown have a duty to prevent an exploitative agreement in 1969? If so, was the 1969 transaction exploitative by providing for a lump sum payment rather than annual compensation to be renegotiated at periodic intervals, or a combination of both?
(b) Was there a duty to obtain an independent assessment of the taxes, rates, charges, or fees being paid by Calgary Power to adjacent jurisdictions for the right of way for the same 1969 transmission line? If so, was that duty breached?
(c) Was there a duty to obtain annual revenues by means of taxes on Calgary Power? If so, was that duty breached?
(d) Was there a duty to minimally impair the Band's interest in the reserve lands granted to Calgary Power for the 1969 right of way? If so, was there a breach of that duty?
(e) Was there a duty to assist the Band to draft and implement appropriate taxation bylaws in the years following approval of the permit for the 1969 line? If so, was there a breach of that duty?
(b) Was there a fiduciary duty to obtain the Band's informed consent to the 1969 transaction? If so, was that duty breached?

Prior to framing the issues, the First Nation did not question the validity of the section 28(2) and section 35 permits under the terms of the *Indian Act*. The written and oral submissions of the First Nation likewise did not question the validity of the section 28(2) permits used to authorize the 1959 and 1967 distribution lines. The statutory validity of these two permits is therefore not in issue. The First Nation, however, questioned for the first time in its written submissions the validity of the permit for the1969 transmission line on the basis that there was a lack of evidence of a valid public purpose justifying an expropriation of reserve lands under section 35(3) of the *Indian Act*. Since this issue was not canvassed previously by the parties, and since Canada has had no opportunity to bring forward evidence to rebut this allegation, the Commission will not consider this question. The analysis will proceed on the premise that the 1959, 1967, and 1969 permits were valid, having met the technical requirements of the *Indian Act*.

PART IV

ANALYSIS

Before beginning to analyze the issues, we shall set out our understanding of the social, economic, and political condition of the Alexis Band in the 1950s and 1960s. It was the capacity or lack of capacity of the Alexis leadership at the time to understand the nature of these rights of way that informs their actions and determines the degree of oversight required by the Crown to ensure that these transactions, in particular the 1969 line, were in the best interests of the Band.

VULNERABILITY OF THE ALEXIS BAND

The First Nation asks us to find that the Alexis Band was vulnerable and dependent on the Department of Indian Affairs in the Band's negotiations with Calgary Power. Most of the evidence before us regarding the conditions on the reserve and the ability of the leadership to negotiate with the power company comes from the witnesses at the community session. Band Councillor Nelson Alexis remembered

> those years as being really hard years. You know, we hardly had any roads here. I was just looking at my gloves. You know, my mom would make mittens out of our socks. You know, she put a little thumb on it and that was our mitts. And, you know, we had to come to school, you know, over – up on the west end of the Reserve through the lake we used to come. And these were really hard times. And you talk about the economic development. There was nothing here.[211]

Phillip Cardinal, whose father was on the Band Council in 1967, also spoke of the general conditions on the reserve in the 1950s:

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[211] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 28, Nelson Alexis).

> Most of our people lived in log cabins. There was no Band office or nothing on the Reserve, nothing. No power, no roads even. So there was no kind of economic development opportunity ... those were real hard times and there was nothing – no kind of support like finance-wise or resource.[212]

Employment prospects on the reserve were also grim, according to witnesses. Since most of the jobs were off the reserve, the opportunity to make some money on reserve by clearing brush for a right of way was, in the words of Nelson Alexis, "heaven-sent because we didn't have anything here."[213] The only benefit to the community from the proposal to build the 1969 transmission line was summed up by Mr Cardinal:

> The only benefit is he [sic] at the time was – that time they had their – they would rely on what one of the previous speakers here said was hunting, fishing, and trapping, and I guess a lot of them worked in the lumber camps and that. It was whatever chance they got to make a dollar, I guess they went for it because it was – well, survival, I guess. There's no – there was no other means of survival besides that, besides the hunting and fishing and trapping and the lumber.[214]

Not only were economic times tough, according to witnesses, but band members, including the leadership, had very few skills in the English language. Chief Francis Alexis told us that his father, who was Chief in 1959, did not know how to read and write English, the language used in the Band Council Resolutions that provided the Band's consent to the three power lines: "my dad would read and write in the Cree syllabics. They used that to write Stony, and I remember (inaudible) used to do the writing for them."[215] Mr Cardinal confirmed that most members of Council in 1967 "probably didn't understand English very well and didn't write the English very well, either. And if they did, then maybe they could sign their name and stuff like that, but that's probably it."[216]

On the question of the Alexis Band's relationship with DIAND officials, several witnesses testified that the relationship was not good. Harold Mustus spoke of DIAND officials as having an attitude of "having to do business their way, not our way."[217] Phillip Cardinal reported that most of the administrative work, including the preparation of BCRs, was done by the Indian Affairs office in Edmonton, which would send the Indian Agent to the reserve once a month.[218] When asked by Commission counsel how the Band would have been in a position to assess whether or not compensation proposed by Calgary Power for a right of way was sufficient, Phillip Cardinal replied:

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[212] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 34, Phillip Cardinal).
[213] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 28 –29, Nelson Alexis).
[214] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 24, Phillip Cardinal).
[215] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 20, Chief Francis Alexis).
[216] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 22–23, Phillip Cardinal).
[217] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 51, Harold Mustus).

> [w]e didn't have that kind of expertise to tell us, you know, it's worth this much or anything like that. There was no lawyers or no kind of consultants around to really advise us on that or advise on leadership or anything like that. Like some of the previous speakers said, when Indian Affairs wanted something done, well, they just brought the BCR out and the leadership were told to sign here and they signed there and there was never any questions asked and they were never told.[219]

Finally, the 1966 report of the Superintendent of the Edmonton Agency, Indian Affairs Branch of the Department of Citizenship and Immigration, cited earlier, supports the testimony of the First Nation's witnesses:

> [i]t is evident that the Enoch Band Council is fairly capable of operating more independently, whereas, Alexis, Alexander, Paul and Beaver Lake Councils still require *considerable guidance* and will do so for some time.[220]

Against this backdrop of limited literacy, education, and employment prospects, argues Alexis First Nation, the Band was vulnerable and dependent on DIAND's officials for counsel and ongoing guidance.[221] This dependency would have been a stark reality in the context of meetings with Calgary Power to discuss the possibility of rights of way over the reserve. The First Nation points to a 1967 *Financial Post* article and the company's 1969 annual report as evidence that Calgary Power, and its successor TransAlta Utilities, has been one of Alberta's largest utility corporations for decades and is the principal distributor of electrical energy in the province. As such, argues the First Nation,

> [t]here was an obvious discrepancy between the bargaining power of one of the Province's largest business corporations and a Band struggling with literacy, a lack of

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[218] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 26–27, Phillip Cardinal).

[219] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 35, Phillip Cardinal).

[220] Superintendent's Report, Edmonton Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, March 31, 1966, to September 30, 1966, NA, RG 10, vol. 8444, file 774/23-4, part 2, reel C-13797, p. 3 (ICC Exhibit 10, p. 172). Emphasis added.

[221] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 11.

> infrastructure and a dependency on government bureaucracy to provide guidance and assistance.[222]

Canada, in contrast, maintains that the First Nation has not provided any evidence that would demonstrate the vulnerability of the Band.[223] With respect to the 1959 and 1967 distribution lines, Canada argues that "the evidence presented supports the opposite conclusion, that the Band council made a good and wise choice by agreeing to bring electricity to the reserve for the benefit of all members."[224] Regarding the 1969 transmission line, counsel for Canada in his oral submission points to the Edmonton *Journal* article written on March 5, 1968, just one day after the Band Council meeting that consented to the 1969 line, as impartial and compelling evidence that the Band Council knew what it was doing. He quotes from the article:

> And if the let's-get-down-to-business attitude of Chief Kootenay motivates his people the way it did his first council meeting, conditions cannot but improve still further ... The council got right down to the matters at hand. Calgary Power wants permission to put powerlines through part of the Reserve. Granted.[225]

Counsel for Canada argues that this article "dispels the notion a little bit of the vulnerability of the Band. The Band seemed to have a no non-sense [sic] approach, knew what it wanted to do and did it and started the process...."[226]

We cannot accept Canada's argument that no evidence of vulnerability has been put forward by the First Nation; the First Nation's witnesses and the Crown's own records collectively point to a condition of vulnerability and dependency in the community. Furthermore, we do not give the Edmonton *Journal* article the weight that Canada does, given the absence of any information about the journalist, in particular her professional qualifications and knowledge of this First Nation. Canada also appears to support a contrary position when it relies on a provision in the *Indian Act* prior to 1988 that prohibited a band from levying taxes on third parties unless the Governor in Council declared that the band had reached an advanced state of development.[227] Canada confirmed not only that an Order in Council containing this declaration with respect to the Alexis Band has not been located, but also that the evidence points to the contrary – "namely, that the counsellors of the day (1969) were illiterate and totally relied upon the Crown for advice and direction." [228]

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[222] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 12.

[223] Submission on Behalf of the Government of Canada, July 16, 2002, p. 7.

[224] Submission on Behalf of the Government of Canada, July 16, 2002, p. 7.

[225] Alma Keroack, "Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268), quoted in Oral Submission on Behalf of the Government of Canada, August 20, 2002, p. 77 (Kevin McNeil).

[226] ICC Transcript, August 20, 2002, p. 77 (Kevin McNeil).

[227] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

We shall return later to the question of dependency as it affected the Alexis Band's decision-making capacity; however, we regard Canada's position on the question of vulnerability to be contradictory. On the one hand, it argued that the *Journal* article provides evidence of the Band's business know-how and lack of vulnerability, and on the other hand, it relied on the evidence put forward by the First Nation to argue that the Band was not sufficiently advanced to qualify for a taxing bylaw.

We are satisfied that the sum of the statements of the elders and other community members, together with the corroborating evidence of a government official familiar with the Alexis Band, support a finding that the Alexis Band was vulnerable in its negotiations with Calgary Power. Whether this vulnerability led to circumstances in which Canada should have exercised greater oversight and responsibility to question the Band's consent to the construction of the three power lines in 1959, 1967, and 1969 is a question to be determined in the following sections.

The First Nation argues[229] that if, as we have found, the Alexis Band was vulnerable in its dealings with Calgary Power, the legal burden of proof shifts to the more powerful party to establish the providence of the transaction, citing as authority the Supreme Court of Canada's case of *Norberg v. Wynrib*. This case concerned a breach of professional duty in which the court found that a physician had taken advantage of a female patient's vulnerability for his own personal gain. The First Nation relies on La Forest J's reference in this case to *Morrison v. Coast Finance Ltd.* (1965), 55 DLR (2d) 710 at 713, in which the factors of an unconscionable transaction are described as

> proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left [the plaintiff] in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.

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[228] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.
[229] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 54.

We agree, however, with Canada's submission[230] that the case of *Norberg v. Wynrib* is inapplicable to the facts of this claim. The other, "stronger" party with whom the Band negotiated was Calgary Power, not the Crown. There is no suggestion that the Crown was the beneficiary of an arrangement struck between the Alexis Band and Calgary Power. Moreover, the above reference in the *Morrison* case makes it clear that, before the onus of proof shifts to the defendant, the plaintiff must prove not only inequality of bargaining power but also that the resulting bargain was substantially unfair. Thus, we find that the burden of proving that the Band's transactions with Calgary Power were substantially unfair, and that the responsibility for those results lies with the Crown, continues to rest with the First Nation.

ISSUE 1 DUTY OF THE CROWN IN GRANTING RIGHTS OF WAY

Did the Department of Indian Affairs breach its statutory and/or fiduciary obligations, if any, to the Alexis Band in the manner in which the Department granted a section 28(2) permit and a section 35 right of way to Calgary Power to construct power utility lines in 1959, 1967, and 1969?

We shall examine this issue through three sub-issues.

Issue 1(a) Duty to Obtain Compensation

Was there a duty to obtain fair and reasonable compensation for the 1959 and 1967 distribution lines? If so, was that duty breached?

The 1959 Distribution Line

The facts surrounding the 1959 permit to construct a power line on the Alexis reserve are not in dispute. Electrification of the Day School on the reserve was part of Indian Affairs' plan to upgrade the facility. Officials determined that the most cost-effective route would be to bring an extension line from the community of Gunn east of the reserve. The cost of constructing the line, including a transformer, was shared between Indian Affairs and consumers living east of the reserve. Indian Affairs' share of the total cost of $6,191 was projected by Calgary Power to be $2,500. The Day School was situated on the reserve and served children living on the reserve. The Band did not pay any of the cost of constructing the distribution line to the school.[231]

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[230] Submission on Behalf of the Government of Canada, July 16, 2002, pp. 20–21.

Indian Affairs obtained authority from the Band for Calgary Power to erect the line and poles across the reserve using a section 28(2) permit under the *Indian Act*. This was a common method of obtaining a right of way for utility power lines serving a reserve. Under section 28(2), however, any interest granted to the permittee, here Calgary Power, for a period longer than one year required the Band Council's consent in addition to the authorization of the Minister responsible for Indian Affairs.[232] On October 21, 1959, the Alexis Band Council met and passed a BCR authorizing an easement to Calgary Power to build a power line from the east boundary of the reserve to the school, the easement being 30 feet wide and 1 7/8 miles long. The only conditions recited in the resolution were that the Band would not receive any payment for the easement and band members would be employed to brush the right of way.[233] There is no record of the discussion at the Band Council meeting or the identity of those in attendance apart from the names of the three councillors who executed the BCR.

The permit itself, dated November 9, 1959, granted Calgary Power a right of way for as long as required for the purpose of an electric power line. It was silent on the condition that band members would be employed to clear the right of way, and no evidence exists to confirm whether Alexis members were given these jobs. In accordance with the BCR, however, no compensation was paid to the Band.

The First Nation does not argue that the Crown failed to comply with the statutory requirements of section 28(2) in granting a permit for the 1959 distribution line.[234] Rather, the essence of the First Nation's argument concerning the 1959 line is that the failure to obtain any compensation for the Band was a breach of treaty rights and a breach of the Crown's fiduciary duty to the Band arising from those rights.

Turning first to the alleged breach of the treaty, the First Nation argues that the promise of land under Treaty 6 included a "fundamental Treaty promise, which was assurance of a homeland for future generations. That is a historic underpinning to the entire fiduciary relationship."[235] The promise of land, argues counsel, also included a promise, flowing from the *Royal Proclamation of 1763*, to ensure the integrity of the land for future generations and the preservation of that land from exploitation or interference by third parties.[236] In addition, the provision of electricity to the school was a right, argues counsel, subsumed within the right to education in Treaty 6. The First Nation points to the case of *Mitchell v. Peguis Indian Band* as authority for the general proposition that treaty benefits are in the nature of a plenary entitlement.[237] The conclusion that the First Nation comes to is that the Band cannot be expected to trade off one right for another without fair and reasonable compensation. The First Nation, however, did not provide an analysis to show how it arrived at its conclusions regarding rights that are incidental to the treaty right to reserve land and the treaty right to education.

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[231] Will Smith, Commercial Supervisor, Edmonton Division, Calgary Power, to G.S. Lapp, Superintendent, Indian Affairs Branch, [Department of Citizenship and Immigration], June 15, 1959, NA, RG 10, vol. 8679, file 774/6-1-007, part 2 (ICC Exhibit 10, pp. 115–16).

[232] *Indian Act*, RSC 1952, c. 149, s. 28(2), as amended by SC 1956, c. 40, s. 10.

[233] Alexis Band, Band Council Resolution, October 21, 1959, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 124–25).

[234] Reply Submission on Behalf of Alexis First Nation, July 31, 2002, p. 6.

Canada did not address the treaty rights' argument and instead maintained that it would be unconscionable for the Crown to deny a First Nation electricity to its school if that would necessarily abrogate another treaty right. Further, says Canada's counsel, the First Nation is free to use its reserve land for many purposes, including schools and houses for its members, and it can also use its lands to bring electricity to those structures. "The fact of the matter is that electricity cannot be beamed in. Electricity has to pass over the land in some way or fashion."[238]

In the circumstances, the Commission is simply not in a position to agree or disagree with the First Nation's description of the content of its treaty rights without the benefit of a full analysis of the law on treaty interpretation by both parties. Further, even if the First Nation is correct in its characterization of these rights, counsel for the First Nation was unable to point to any authority to support the conclusion that a treaty benefit provided at the expense of the Crown solely for the residents on reserve, namely electricity to the school, should require, in addition, compensation to the First Nation if that benefit necessarily encroaches on reserve land.[239] We are, therefore, not able to accept the First Nation's proposition that, as a matter of treaty rights, Alexis was entitled to compensation for the 1959 right of way.

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[235] ICC Transcript, August 20, 2002, p. 14 (Trina Kondro).

[236] ICC Transcript, August 20, 2002, p. 14 (Trina Kondro). See also Submission on Behalf of Alexis First Nation, May 24, 2002, pp. 30–31.

[237] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193, [1990] 2 SCR 85 at 130.

[238] ICC Transcript, August 20, 2002, pp. 59–60 (Kevin McNeil).

[239] ICC Transcript, August 20, 2002, p. 25 (Trina Kondro).

Was there a fiduciary obligation to obtain compensation for the Band in such a case? We think not. The leadership knew that the recipient of electricity would be a school on the reserve, which was in the process of being upgraded by Indian Affairs; they executed a formal BCR agreeing to the right of way for the purpose of electrifying the school; and they must have known that the Band would not be liable for the costs of construction. They also clearly envisaged that some band members would receive brushing contracts, although it is not known how much work, if any, was provided. Chief Alexis remarked that, because nobody had electricity on the reserve in 1959, the line to the school represented a benefit to the community and, recalls Chief Alexis, it also meant that people could watch television at the school.[240]

Although we shall discuss the nature and extent of the Crown's fiduciary obligation more fully later in the report, we are satisfied on the facts that this was not a situation in which the Band made a bad decision as the result of the vulnerability of its leadership in negotiations with Calgary Power. Even though the Crown may have initiated the discussions between the Band and the company, the Band's decision was made with the necessary information, the decision was in the Band's best interest, and the Band freely gave its consent.

We also note in passing that a section 28(2) permit under the *Indian Act* is silent on the question of compensation, unlike the expropriation provisions in section 35 of the Act. There is, therefore, no statutory requirement to compensate a First Nation in return for its consent to a section 28(2) permit under the *Indian Act*.

The 1967 Distribution Line Extension

The extension of the distribution line in 1967 from the Day School power line to the south boundary of the reserve was, like the original 1959 line, authorized by a section 28(2) permit, and consented to by the Band Council as required for a permit in excess of one year. The primary difference between the 1959 line and the 1967 line is that, according to a preponderance of the evidence presented at the inquiry, the main purpose of the 1967 line was to bring electricity to cottages at an off-reserve community called West Cove on the south shore of Lac Ste Anne.

At the same time, we are satisfied from the community evidence that this line was also used to provide electricity to a number of houses on the reserve in 1967: "Most of the houses on the Reserve," said Chief Alexis, "they had no power until 1967 or '68, around centennial year."[241] Regardless of the primary objective of the 1967 line, its construction brought electricity to reserve houses for the first time as well as to an off-reserve location south of The Narrow, although it seems likely that construction of the line was halted before it reached West Cove.

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[240] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 70, Chief Alexis).

We note that Calgary Power's plan to supply electricity to houses on the reserve from the 1967 line would have been consistent with its statutory obligation to supply, if requested, electrical wiring to buildings along the path of a power line. *The Water, Gas, Electric and Telephone Companies Act* of Alberta provided that

> [w]here a company has constructed works for supplying any municipality or municipalities with gas, water, electricity or telephones and the company is able to do so, the company shall supply all buildings situate upon land lying along the line of any supply pipe or wire upon the request of the owner, occupant or other person in charge of any such building.[242]

Thus, it is reasonable to infer that the collateral purpose of the 1967 line, if not its original intent, was to provide electrical service to reserve houses. Howard Mustus's testimony corroborates that of Chief Alexis that electrification of houses took place starting in 1967.[243] A DIAND report in late 1967 further confirms that contracts had been let for electrification of 55 homes on the Alexis reserve.[244]

The only issue raised by the First Nation with respect to the 1967 distribution line extension is the adequacy of compensation. Again, we do not know the circumstances surrounding the 1966 BCR agreeing to the grant of a right of way for the 1967 line, the role of the Calgary Power representative at the meeting at which the resolution was passed, or the involvement, if any, of Indian Affairs. But, unlike the 1959 permit, this time there was an agreement between Calgary Power and the Alexis Band Council to pay the Band compensation in the amount of $15 per pole. The total compensation amounted to $195 for 13 poles and guy wires. Curiously, the 1966 BCR did not provide for band members to earn money by clearing the proposed right of way, and there is no evidence before us to indicate whether band members received any work.

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[241] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 71, Chief Alexis).

[242] *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, c. 361, s. 22, as amended by SA 1956, c. 60.

[243] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p 17, Howard Mustus).

[244] Edmonton-Hobbema District, Indian Affairs Branch, DIAND, "Semi-Annual Report – April 1/67 – September 30/67," NA, RG 10, vol. 8444, file 774/23-4, part 2, p. 5 (ICC Exhibit 10, pp. 227–35).

The elders who commented on the benefits of electricity to the reserve in 1967 spoke generally of the convenience of having electricity to warm up a car engine in winter, to run modern appliances, or to watch television; however, Chief Alexis pointed out that the community pays for the electricity and that these so-called benefits do not help the children in terms of their culture and recreation, nor do they provide an economic benefit to the community.[245]

Notwithstanding some mixed views within the community on the benefits of electricity to the homes on the reserve, the First Nation is not arguing that the Band Council's decision to permit the right of way should have been prevented by DIAND. Canada argues that the BCRs consenting to the 1959 and 1967 rights of way "provide direct evidence of the Band's intention and desire to grant the permits of occupation for the purpose of bringing power to the reserve."[246] We agree with Canada's argument. Without evidence to suggest a subsequent change of mind, indecision, or misunderstanding of the arrangement with Calgary Power, we find the BCRs persuasive. The question is, was the $195 adequate compensation? If not, should DIAND have interceded to ensure that the amount of compensation reflected the best possible arrangement for the Band?

One method of assessing the adequacy of the compensation would be to ask what Calgary Power was paying non-reserve landowners and other bands for the construction of power line poles in similar situations. The First Nation, however, was unable to provide any evidence to suggest that $15 per pole was an unreasonable payment in circumstances where electrical services would be provided to both a reserve and a non-reserve community.

Canada points out that the departmental practice in addressing compensation for the granting of easements differed depending on the type of easement. The history of easements on the Alexis reserve in the 1950s and 1960s, in fact, illustrates that practice. In a case where the band was to be the sole recipient of the electricity, as in 1959, no compensation was payable. Where, however, the band agreed to a right of way for a distribution line initially intended for an off-reserve community but also servicing the reserve, as was the case in 1967, the band received some compensation. By contrast, in a case in which the band received no benefit of electricity from a power line crossing its reserve but serving only the interests of off-reserve communities and the power company, as with the 1969 line, DIAND recognized the need to ensure a different level of compensation.[247]

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[245] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 82–83, Chief Francis Alexis).
[246] Submission on Behalf of the Government of Canada, July 16, 2002, p. 9.

As was pointed out earlier, section 28(2) is silent on the question of compensation to a First Nation where a section 28(2) permit is granted. Nevertheless, the 1967 line did demand some compensation to the First Nation because others were intended to benefit from its construction over reserve land. The First Nation received compensation in the amount of $195. It also received the benefit of access to electricity from the line. Without any evidence to suggest that the amount of $195 was patently unreasonable in the circumstances, we are unable to agree with the First Nation that Canada owed a duty, fiduciary or otherwise, to attempt to obtain better terms for the Band. Although the First Nation was vulnerable in its ability to negotiate with Calgary Power, there is no evidence to suggest that the company took advantage of this vulnerability in its plans to build a distribution line to service the West Cove cottages.

There are two remaining questions related to adequacy of compensation that the First Nation raises in connection with the 1959 and 1967 lines. The first question relates to whether band members received work clearing the 1959 right of way, one of the terms of the BCR, but one which was not inserted in the subsequent permit. Further, the absence of any reference to band employment in the BCR consenting to the 1967 right of way is also questioned by the First Nation. The only evidence before us of band members clearing brush from a right of way, however, relates to the 1969 transmission line.[248] Without any evidence indicating that band members were not employed clearing brush on the 1959 line, we are unable to determine whether the Band was treated unfairly by Calgary Power and, if so, whether DIAND bore any responsibility for the consequences.

The second question relates to the insertion of a taxation provision in each of the permits granted to the permittee, Calgary Power, in 1959 and 1967. The legal implications of this clause in all three right of way permits affecting the Alexis reserve will be discussed in the context of the 1969 transmission line.

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[247] Submission on Behalf of the Government of Canada, July 16, 2002, p. 9.

[248] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 25, Phillip Cardinal; p. 28, Nelson Alexis; p. 35, Howard Mustus).

The Fiduciary Relationship and the 1969 Transmission Line

The remainder of the issues in this claim relate to the transmission line right of way constructed across the Alexis reserve from the southeast to the northeast boundary to service non-reserve communities. The issues deal primarily with the extent of the Crown's fiduciary relationship with the Alexis First Nation and the nature of the fiduciary duties that arose in the circumstances surrounding the negotiation and implementation of the agreement to grant the transmission line right of way to Calgary Power.

We have already found that the Alexis First Nation was in a vulnerable state owing to the relatively low levels of literacy and education and the high levels of poverty and unemployment experienced by the Band in the 1950s and 1960s. It was clearly not on a level playing field with Calgary Power when it came to face-to-face negotiations. Nor would the leadership have understood the statutory requirements in section 28(2) of the *Indian Act*. Nevertheless, the circumstances surrounding the 1959 and 1967 lines were straightforward in that the Band understood that, in return for its consent, the distribution lines would bring direct benefits to the community in the form of electrification. As we have found, no fiduciary duty arose on the part of the Crown to assist the Band to negotiate a better deal because, as we have found, the agreements on compensation were adequate. The fiduciary relationship is, however, critical to the circumstances surrounding the grant of a right of way to Calgary Power in 1969.

The source of the fiduciary relationship between the Alexis First Nation and the Crown is two-fold, according to the First Nation. In the first place, Treaty 6, to which the Alexis Band adhered in 1877, promised reserve land to the Alexis Band, to be administered and dealt with for them by the Crown. In particular, the treaty provided that the Crown would retain the discretion to deal with any settlers within the bounds of the reserve and that the Crown could sell or dispose of reserve land for the benefit of the Indians with their consent.[249] As counsel for the First Nation stated,

> [a]ny time that we are dealing with issues concerning the use of Reserved lands, we are ultimately dealing with a fundamental Treaty promise, which was assurance of a homeland for future generations. That is a historic underpinning to the entire fiduciary relationship. So the fiduciary relationship is not something that exists separate and apart or was created afterwards.[250]

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[249] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 29.

[250] ICC Transcript, August 20, 2002, p. 14 (Trina Kondro).

According to the First Nation, both the *Royal Proclamation of 1763* and section 91(24) of the *Constitution Act, 1867*, underscore the Crown's role in protecting Indian lands from exploitation by third parties.

Second, the First Nation points out that the *Indian Act* sets out a scheme of complete control and absolute discretion by the Crown over reserve lands.[251] In this regard, states the First Nation, the Supreme Court of Canada has recognized the *Indian Act* as bearing "the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763"[252] – namely, that the Crown is "honour-bound to shield Indians from any efforts by non-natives to dispossess Indians" of their reserve land.[253] It is this complete discretion over dealings with reserve land, argues the First Nation, that gives rise to certain fiduciary duties on the part of the Crown. Whether in the context of a surrender, as in the Supreme Court of Canada case of *Guerin v. The Queen*, or in the context of a grant of a lesser interest, such as expropriation, as in the cases of *Kruger v. The Queen* or *Osoyoos Indian Band v. Oliver (Town)*, the Crown has interposed itself between third parties and the Indians to prevent their being exploited. As such, argues the First Nation, the Crown has created for itself a fiduciary duty to decide, in its sole discretion, where the best interests of the Indians lie and then to act in their best interests.[254]

Canada does not disagree with the First Nation that a fiduciary relationship exists in circumstances in which the Crown is alienating reserve land to a third party. The Crown, states Canada, has a fiduciary duty in relation to both surrenders and expropriations of reserve land. This duty consists of ensuring that the Band is properly compensated, "*as part of the obligation* to deal with the lands for the benefit of the Band."[255] Where Canada and the First Nation disagree is on the nature and scope of the fiduciary obligations that arose in these particular circumstances.

What then are the relevant components of the fiduciary obligation that the Crown owed to the Alexis Band as a result of the 1969 expropriation? The 1995 Supreme Court of Canada case of *Blueberry River Indian Band v.*

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[251] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 31.

[252] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 226, [1990] 2 SCR 85 at 131.

[253] *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 at 226, [1990] 2 SCR 85 at 131.

[254] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 32, citing *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 340 (SCC); *Kruger v. The Queen* (1985), 17 DLR (4th) 591 at 597 (FCA); and *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 at 405 (SCC).

[255] Submission on Behalf of the Government of Canada, July 16, 2002, p. 19. Emphasis added.

Canada, commonly known as *Apsassin*,[256] since followed in *Semiahmoo Indian Band v. Canada*,[257] sets out a test for determining if the Crown has met its fiduciary duty in the context of a surrender. Under the surrender provisions of the *Indian Act*, it is the Band who ultimately decides whether to surrender its land. That decision is to be respected, stated McLachlin J (as she then was), unless the surrender would be foolish, improvident, or exploitative.[258] It is this test – namely, to ask whether the Crown has met the duty to prevent a foolish, improvident, or exploitative deal, that Canada relies on as the applicable test in a claim concerning expropriation.[259]

The First Nation, however, argues that the fiduciary obligation in a situation in which reserve land is to be expropriated is not confined to the prevention of exploitation, precisely because, unlike a surrender, an expropriation gives the First Nation no statutory right to refuse the transaction. In an expropriation, only the Crown gives legal consent and only the Crown and the expropriating authority are parties to the agreement.

In a letter dated April 23, 1996, to Mr Al Gross, federal negotiator, Specific Claims West, Mr Jerome Slavik, counsel for the Alexis First Nation, wrote:

> In *Apsassin*, the Court found the Government had not breached any fiduciary obligation in its pre-surrender advice to the Band in that it had conducted appraisals and had been duly diligent in advising the Band as to the consequences of their surrender. They did, however, fail to act reasonably in the manner in which they disposed of the mines and minerals by failing to follow standard practices to ensure obtaining fair and reasonable value for their sale.[260]

Counsel for the First Nation points out that in the *Apsassin* case, the Blueberry River Indian Band had the statutory right to make the ultimate decision to surrender its reserve land and that, therefore, the Crown was restricted to a supervisory role to ensure that the transaction was not exploitative. Where the band is not the decision-maker, however, the First Nation argues that a more stringent test should be applied to determine the Crown's standard of care. The First Nation does not maintain that the duty to prevent exploitation is irrelevant, rather that the applicable test in a situation in which the Crown has the sole right to make the decision is to ask whether a reasonable person of ordinary prudence managing his own affairs would agree to the arrangement.[261]

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[256] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193, [1995] 4 SCR 344.

[257] *Semiahmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 at 536 (FCA).

[258] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 208, [1995] 4 SCR 344 at 371.

[259] Submission on Behalf of the Government of Canada, July 16, 2002, p. 21.

[260] Jerome N. Slavik, Counsel, Ackroyd, Piasta, Roth & Day, to Al Gross, Federal Negotiator, Specific Claims West, Indian and Northern Affairs Canada, April 23, 1996 (ICC Exhibit 3, p. 1).

This test was applied in *Apsassin* to the situation in which the Crown made a unilateral decision to transfer the mineral rights in surrendered land without the knowledge or consent of the band. McLachlin J stated:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*(1976), 70 D.L.R. (3rd) 257 at p. 267, [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.[262]

Based on the fact that both the decision to expropriate in this claim and the decision to transfer mineral rights in *Apsassin* were exclusively controlled by the Crown, the First Nation asks us to rely on the standard of the reasonable person of ordinary prudence managing his own affairs as the critical test for assessing whether the Crown met its fiduciary duty to the Alexis Band.

Canada relies instead on a different component of the Crown's fiduciary obligation in an expropriation of reserve land, as articulated in the recent Supreme Court of Canada case of *Osoyoos Indian Band v. Oliver (Town)*.[263] The Court held that "the fiduciary duty of the Crown is not restricted to instances of surrender"[264] and will attach to expropriations. As Canada points out,[265] Iacobucci J, writing for the majority, held that the Crown's fiduciary duty arises once the Crown determines that it is in the public interest to expropriate Indian lands. The Crown is then required to expropriate the interest required to fulfill the public purpose while preserving the Indian interest in land to the greatest extent practicable. It is known as the minimal impairment test.

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[261] ICC Transcript, August 20, 2002, pp. 44–45 (Trina Kondro).
[262] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 230, [1995] 4 SCR 344 at 401.
[263] *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 (SCC).
[264] *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 at 405 (SCC).
[265] Submission on Behalf of the Government of Canada, July 16, 2002, p. 25.

> The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienation in the *Indian Act* which is to prevent the erosion of the native land base: *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, 147 D.L.R. (4th) 1, at para. 52. The contention of the Attorney General that the duty of the Crown to the band is restricted to *appropriate compensation* cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced.
>
> As the Crown's fiduciary duty is to protect the use and enjoyment of the Indian interest in expropriated lands to the greatest extent practicable, the duty includes the general obligation, wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land, thus ensuring a continued ability to earn income from the land. Although in this case the taxation jurisdiction given to bands came after the Order in Council of 1957, *the principle is the same, namely that the Crown should not take more than is needed for the public purpose and subject to protecting the use and enjoyment of Indians where appropriate.*[266]

We note that, although the *Osoyoos* case involved a section 35 expropriation, the factual circumstances in that case differ from those in the Alexis claim, effectively limiting the application of *Osoyoos* in this instance. In *Osoyoos*, the Supreme Court addressed the issue of whether lands taken by a section 35 expropriation remained in the reserve for the purpose of applying band taxation bylaws. The Court did not address the scope of the Crown's fiduciary obligations when negotiating a compensation package on behalf of the First Nation, which is essentially the issue before this Commission. Accordingly, we do not interpret the *Osoyoos* decision as setting out an exhaustive list of fiduciary duties required of the Crown in an expropriation. Rather, in our view, the decision, when applied to this claim, stands for the proposition that one of the Crown's duties is to ensure that the expropriating power takes no greater legal interest in the land than is necessary.

It is clear from the recent case law[267] that the Crown must act in the best interests of the Band in an expropriation of reserve land. As Canada acknowledges, the Crown has a duty, as part of its obligation to act in the Band's interest, to see that it is properly compensated. A corollary duty is to prevent the exploitation of the Band.

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[266] *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 at 406 (SCC). Emphasis added.

[267] See, in particular, *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 (SCC), and *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (FCA).

Even if the arrangement cannot be shown to be exploitative, however, we must apply the test of whether a reasonable person of ordinary prudence managing his or her own affairs would agree to the transaction. We are persuaded by the First Nation's argument that this test is applicable to a situation in which the First Nation is totally reliant on the Crown to negotiate a transaction with a third party for the alienation of reserve land. To adopt this test requires that we not only look at the adequacy of the deal from the perspective of the Band at the time, as Canada's counsel suggests,[268] but also apply an objective standard of the reasonable person managing his or her own affairs. In other words, would the Crown, acting as a reasonable, prudent person, with all the relevant knowledge available to it, have made the same deal for itself that it made for the Alexis Band?

Finally, the duty of minimal impairment also requires that the Crown ensure that no greater legal interest than necessary is transferred to the permittee.

We now turn to the specific questions that arise given the facts of this claim in order to determine whether the Crown breached its fiduciary obligations to the Alexis First Nation in permitting Calgary Power to expropriate reserve land in 1969 for a transmission line.

Issue 1(b) Duty to Advise in Negotiations

Was there a duty to advise the Band of the relative strength of its bargaining position with Calgary Power in the negotiations for the 1969 transmission line and to keep the Band informed? If so, was that duty breached?

The only experience that the Alexis First Nation had had with Calgary Power prior to the discussions in 1968 leading to the 1969 transmission line concerned plans for two relatively small distribution lines that would provide electricity to the reserve. The rights of way for these distribution lines were granted pursuant to section 28(2) of the *Indian Act* and required both Band and ministerial consent. The section 28(2) permits were, according to the PHI report,[269] a common means of creating public utility easements on reserves. The *Land Management and Procedures Manual* of 1983 also identified section 28(2) permits as appropriate for distribution lines serving the reserve but not for transmission lines passing through a reserve and providing little or no service to the reserve.[270]

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[268] ICC Transcript, August 20, 2002, pp. 102–3 (Kevin McNeil).

[269] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 27 (ICC Exhibit 6, p. 27).

By comparison, the plan to construct a high voltage transmission line with towers across the reserve was a larger and very different proposition. Under Alberta legislation,[271] Calgary Power had the authority to take land required for a public purpose without the consent of the owner. In order to provide for expropriation of Indian reserve land under federal jurisdiction, section 35 of the *Indian Act* sets out a regime whereby the corporation possessing the legislative authority to expropriate can take reserve land with the consent of the Governor in Council. In the alternative, the Governor in Council can authorize a grant or transfer of the reserve land to the corporation.[272] Either way, Calgary Power was in a strong bargaining position with the Alexis Band Council in 1968. Even though DIAND policy at the time was to obtain the consent of the Band to an expropriation under section 35,[273] band consent was not a condition precedent to the taking.

The first record of the Band's deliberations and agreement to allow the 1969 line was on March 4, 1968, when the Band Council passed a resolution authorizing Calgary Power to erect approximately 13 guyed towers and power lines across sections 11, 14, 23, and 26 of township 55, range 4, west of the 5th meridian, in return for compensation of $100 per acre for approximately 41 acres. The right of way was to be 100 feet wide but the actual width of the clearing, according to the BCR, would be 150 feet, and band members were guaranteed the right to do all the clearing for $300 per acre for approximately 61 acres.[274] Unfortunately, we do not know what information the Band Council had before passing this resolution, nor can we confirm the name of the Calgary Power representative who discussed the plan with the Band or whether a DIAND official participated in the negotiations.

The circumstances surrounding the signing of the 1968 BCR are important because Canada points out that a memo dated March 29, 1968, from A.H. Murray, Acting Officer in Charge at the Edmonton-Hobbema District of DIAND, to R.D. Ragan, the DIAND Regional Director for Alberta, enclosing the BCR, is the first indication of DIAND's involvement in this matter. Counsel for Canada suggests that this memo and another memo dated March 15, 1968, from T.A. Turner, Superintendent in Charge of the Edmonton-Hobbema District, to Regional Director Ragan, regarding discussions between the Paul Band and Calgary Power concerning the same transmission line, are some evidence that Calgary Power had a practice of negotiating agreements with bands directly. This practice, Canada says, means that DIAND's involvement would only be triggered once the BCR was passed.[275] The Edmonton *Journal* account of the Band Council meeting that approved the transmission line right of way quotes an official from Indian Affairs who appeared to have been at the meeting;[276] however, his identity is unknown and his role, if any, in the negotiations between the Band and Calgary Power is not clarified by this evidence. It should also be noted that Turner expressed concerns that DIAND officials were not in attendance at the Paul Band discussions by advising Ragan that Turner's office "has notified the Council and Calgary Power that in dealings of this nature, a member of this Department will have to be present."[277]

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[270] DIAND, Lands Directorate, Reserves and Trust, *Land Management and Procedures Manual*, September 1983 (ICC Exhibit 7, pp. 57, 68–69).

[271] *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, c. 361, ss. 30–33, as amended by SA 1956, c. 60, s. 4.

[272] *Indian Act*, RSC 1952, c. 149, s. 35.

[273] Vivian Little, "Guidelines on Expropriations," March 1994 (ICC Exhibit 7, pp. 7–9).

[274] Alexis Band, Band Council Resolution 1967-68/22774-25, March 4, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 367).

The elders were able to testify generally that it was the Indian Agent who would come out to the reserve, and that if DIAND needed a decision, the Agent would bring a prepared BCR to be signed. But no one knew the name of the Indian Agent at the time of the 1968 BCR. Phillip Cardinal believed that the Indian Agent was a person by the name of Cliff Sim and that it was he who brought a Calgary Power representative named Charlie [likely Shirley] Johnson to the reserve to discuss the terms of the right of way;[278] however, counsel for Canada advised the Commission that although Clifford Sim's signature appears on a sketch for the 1967 line,[279] DIAND has no record of his being an employee of DIAND:

> That could lead to another inference that Mr. C. Simms [sic] was an employee of C.P.L. [Calgary Power]. But we know that he wasn't an Indian agent with DIAND. So to answer your question, I think a reasonable inference could be made that the B.C.R. may have actually been negotiated between the Band and C.P.L.[280]

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[275] ICC Transcript, August 20, 2002, p. 80 (Kevin McNeil).

[276] Alma Keroack, "Conditions Improve for Indian Reserve – Democratic System Pays off at Alexis," Edmonton *Journal*, March 5, 1968, p. 9 (ICC Exhibit 10, p. 268).

[277] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, Indian Affairs Branch, March 15, 1968, Federal Records Centre, DIAND, file 774/331-3-7-133A-1, vol. 2 (ICC Exhibit 10, p. 271).

[278] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 23–24, Phillip Cardinal).

[279] T. A. Turner, District Supervisor, Edmonton-Hobbema District, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, April 25, 1967, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 203).

[280] ICC Transcript, August 20, 2002, p. 75 (Kevin McNeil).

Further, when Mr Cardinal was asked if Cliff Sim was the Indian Agent involved at the time that the transmission lines were being built, he replied that, "according to my recollection, there was none."[281]

Notwithstanding the lack of evidence concerning the identity and the role, if any, of the Indian Agent in the negotiations between the Band and Calgary Power, it is a troubling possibility that Mr Sim could have been a representative of Calgary Power in the discussions leading up to the BCR and that the Band Council believed him to be the Indian Agent.

We agree with Canada that the evidence points to the possibility that the power corporation negotiated deals with bands for major transmission lines with little or no knowledge or oversight by the Indian Agent. This possibility raises the question of whether the Alexis Band could have represented its own interests adequately in these discussions. At a minimum, this arrangement should have put DIAND officials on notice that the BCR may not have been the product of equal bargaining power and adequate knowledge of the possible options on the part of the Alexis Band Council. Certainly Turner was concerned enough to insist that a member of his department attend future meetings of this nature.

The First Nation points to one example of information that should have been available to the Alexis Band when it negotiated with Calgary Power for the right of way or to DIAND when it was assessing whether the deal was in the Band's best interests. They should have known, argues the First Nation, what it would have cost to obtain an alternate right of way around the reserve. Yet no evidence exists showing that Calgary Power divulged to DIAND, if not to the Band, the comparable cost of routing a line around the reserve when the corporation was applying for section 35 approval. As the First Nation states,

> [a] reasonably prudent person does not conduct negotiations oblivious to the strengths or weaknesses of her bargaining position. In failing to make this basic assessment, the Crown breach [sic] its fiduciary obligations to Alexis.[282]

Even though DIAND may not have been aware of the negotiations leading up to the BCR, it would have been possible in the following months for officials to revisit the agreement and with their knowledge of negotiations in matters of rights of way, determine whether this arrangement was fair to the

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[281] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 53, Phillip Cardinal).

[282] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 42.

Band. Canada rightly points out that DIAND did not rush to give immediate approval to the right of way, as is evidenced by the lapse of 15 months before finalizing the agreement and the exchange of memos among DIAND officials. We recognize, however, that, from the Band's perspective, there was very little contact with DIAND officials during this time.

Officials did meet with the Alexis Band Council on September 30, 1968, to present the plan of survey for the proposed right of way and, according to a memo from Turner to Ragan dated October 8, 1968, the Council approved the plan at this meeting.[283] The record also indicates that Turner wrote to Ragan on December 16, 1968,[284] indicating that he, Turner, had met with the Band Council and Calgary Power officials to discuss the terms of the right of way, using as a template an agreement that had been prepared for the Paul Band, and that it "meets with the satisfaction of all concerned." In this same letter, however, Turner states that they are unable to get the Alexis Band Council to "say definitely what they feel should be written into a contract such as this" but that the Band Council was favourable to an annual rental provision. Turner also asked that a draft agreement for the Alexis Band be drawn up so that he could sit down with the Band Council and Calgary Power to discuss it "clause by clause." Early in 1969, Ragan forwarded Turner's request to headquarters.[285] There is, however, no evidence that a meeting with the Band Council to review the Alexis agreement ever took place.

In conclusion, we find on the evidence that DIAND officials were likely not aware of the initial negotiations between Calgary Power and the Band and, thus, no opportunity arose at that time to advise the Band of the relative strength of its bargaining power. Officials must have been aware, however, after receiving the BCR that the Band could well have been at a disadvantage negotiating directly with Calgary Power. This would explain Turner's concern with the lack of departmental supervision in "dealings of this nature." As we have seen, departmental records described the Alexis Band as requiring considerable guidance for some time to come. In particular, the Indian Agent at the time would have been aware of the limited levels of education, literacy, and knowledge of the English language on the reserve.

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[283] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, October 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 296). See also J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, November 7, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 298).

[284] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[285] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

In the circumstances, once the Crown learned of the BCR, it had a duty to scrutinize the deal made with Calgary Power, in particular to find out the cost of building an alternate route outside the reserve and to tell the Band Council. This knowledge would have also enhanced the bargaining position of the Crown in its meetings with Calgary Power on behalf of the Band. Consequently, the Crown was in breach of its duty to advise the Band of the strength of its bargaining position with Calgary Power, in particular by finding out the cost of an alternate transmission line route.

Issue 1(c) Duty to Obtain Independent Appraisal

Was there a duty to obtain an independent appraisal of the fair market value of the land to be expropriated for the 1969 line and advise the Band accordingly? If so, was that duty breached?

The First Nation argues, on the basis of McLachlin J's judgment in *Apsassin*, that a reasonably prudent landowner would never have agreed to the terms of compensation without conducting an independent appraisal of the land. This, they say, was not done. The First Nation contends that DIAND officials, in particular Ragan, only provided comparable numbers once the adequacy of the compensation was questioned by a DIAND official,[286] R.G. Young, Chief, Resources and Industrial Division, at DIAND headquarters.

Young was asked by the Deputy Administrator of Lands, J.H. MacAdam, for his "recommendations regarding the proposed easement, its location, and the terms of compensation."[287] Young's reply, set out in full in Part II, is the first significant record of a concern within DIAND about the lack of analysis by the Alberta regional office and the adequacy of the compensation. Among the concerns identified, Young wrote: "The Region should provide more substantiation of the rental level and a review clause is needed."[288]

This letter led to a lengthy response from Ragan on behalf of another official, E.C. Holmes. Ragan indicated that Holmes had examined the market for farmland in the vicinity of the Wabamun [Paul Band]and Alexis reserves and set out five comparable sales of cultivated and non-cultivated land in

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[286] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 43.

[287] J.H. MacAdam, Deputy Administrator of Lands, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, DIAND, April 17, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 284).

[288] R.G. Young, Chief, Resources and Industrial Division, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

1968. The sales indicate a value of $70 to $100 per acre for cultivated land and $30 to $50 for uncultivated land. Using the "Blackstock formula" (150 per cent of the value of the land plus 10 per cent), an unofficial method developed by an Alberta judge for assessing the fair market value of easements, and assuming an average of $40 per acre for uncultivated land, Ragan concluded that $66 per acre would be considered adequate compensation.[289]

Canada relies heavily on this letter in both its written submission and oral argument as proof not only of the Crown's efforts to assess the value of compensation but also as evidence that the lump sum paid to the Band, $100 per acre for a total of $4,296, was more than adequate compared to values at the time. The only other evidence before the Commission was provided by the First Nation. Information obtained from TransAlta Utilities, the successor company to Calgary Power, indicates that the company paid $95 per acre to a private landowner for an easement over cultivated land adjacent to the Alexis reserve in 1969.[290] Canada concludes that this evidence corroborates the Crown's assessment at the time that the Band obtained adequate compensation when it was paid $100 per acre for undeveloped land.[291]

Whether the Crown sought out information on fair market values at the time in order to justify and defend its position, as the First Nation contends,[292] or Ragan had this information available to him already, the fact that the Crown did not retain an independent appraiser is not, in our view, tantamount to a breach of fiduciary duty in these circumstances. The fact remains that the Crown did compile information on land values in the area and did adjust them upwards to reflect a higher value for an easement and injurious affection. The record does not indicate Holmes's expertise in assessing land values for the department; however, the recent evidence that one adjacent property was valued in 1969 at $95 per acre for easement purposes satisfies us that, notwithstanding the lack of an independent opinion, the Crown acted reasonably and, with respect to the per acre value of the lump sum, might well have agreed to that amount for itself.

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[289] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to Indian Affairs and Northern Development, Ottawa, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 299).

[290] Chuck Meagher, Legal Counsel, TransAlta, to Ackroyd, Piasta, Roth and Day and Carole Vary, November 8, 2000 (ICC Exhibit 14, p. 5).

[291] Submission on Behalf of the Government of Canada, July 16, 2002, p. 21.

[292] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 44.

ISSUE 2 DUTY TO OBTAIN ANNUAL PAYMENT

Did the Department of Indian Affairs breach its statutory and/or fiduciary obligation to the Band by failing to obtain a reasonable annual fee, rental or charge as permitted in agreements between DIAND and Calgary Power?

As we indicated in Part III, to answer this question we have analyzed the subsidiary issues involved.

Issue 2(a) Was the 1969 Lump Sum Payment Exploitative?

Did the Crown have a duty to prevent an exploitative agreement in 1969? If so, was the 1969 transaction exploitative by providing for a lump sum payment rather than annual compensation to be renegotiated at periodic intervals, or a combination of both?

Background

We now come to a critical issue in this claim, the decision by Indian Affairs to approve the 1969 easement to Calgary Power based on a one-time lump sum payment. The Alexis Band Council had consented in a BCR to receive a lump sum of $4,296 from Calgary Power in return for providing a right of way to the company for a high-voltage transmission line using 13 towers across IR 133 from south to north. Over the 15 months that elapsed before final approval, the record shows that there was an active and intense debate among DIAND officials over the fairness of its policy of granting long-term interests on Indian reserves to utility corporations for lump sum consideration. Officials also debated the propriety of using section 28(2) permits to grant such interests, knowing that they were in reality grants in perpetuity. It is to this correspondence that we now turn to determine whether the Crown had a fiduciary duty to make efforts to improve the terms of the deal between the Alexis Council and Calgary Power or even to reject the arrangement outright. If the answer is yes, it had a fiduciary duty, and if the Crown breached that duty, was the resulting deal – a lump sum payment – exploitative?

As we have set out in Part II, the change in policy for utility rights of way began in the section of DIAND responsible for mineral rights, in particular pipeline rights of way. The correspondence, beginning in June 1967 with a memo from G.A. Poupore, Chief of Lands, Membership and Estate Division, indicated that pipeline rights of way would be subject to a new policy – namely, that

> all easements in perpetuity (as long as required) must be granted pursuant to the provisions of Section 35 of the Act [marginalia: "without surrender"] or by sale or lease following a surrender for that purpose. Inasmuch as there is no intention of adopting the latter method except in extremely special circumstances, Section 35 will be the means for granting easements to all bodies holding the power of expropriation in their charter.[293]

Poupore's memo was first sent to E.A. Moore, Supervisor of Minerals, in Calgary and then circulated in September 1967 to all regional directors with the notation that this was the policy to be followed for all oil and gas pipeline easements in future. R.D. Ragan, Regional Director for Alberta, was one of the recipients.

Moore then released a discussion paper, intended primarily for the oil and gas industry but also identifying general concerns about the existing policy of granting section 28(2) and section 35 interests. The text of his paper, sections of which are reproduced in Part II, contains a number of important statements that speak directly to an awareness, at least in the context of oil and gas pipelines, of the duty to ensure that grants of interests in reserve land to third parties are in the Indians' best interests.

> The protection of Indians seems to revolve around that provision of adequate safeguards *to ensure that the Indian Bands will receive sufficient compensation in the form of initial payments and annual rentals* and to ensure that future developments on the reserve will not be hampered by the issuance of rights to companies in the form of easements, leases, permits, etc. It is our contention that the Indians should receive compensation which is commensurate with that received by non-Indians under similar circumstances.
>
> ...
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> Usually Band Councils have signed resolutions requesting suitable documents to be issued by the Branch without being very specific in the wording of the resolution; however, at the same time being aware of the intent of an application for a lease, easement, right-of-way, etc. *Given proper guidance* their resolutions could be very specific as to length of primary term, renewals, compensation, etc.[294]

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[293] G.A. Poupore, Chief, Lands, Membership and Estate Division, Indian Affairs Branch, Department of Citizenship and Immigration, to Supervisor of Minerals, Indian Affairs Branch, Department of Citizenship and Immigration, June 7, 1967, Federal Records Centre, DIAND, file 1/31-1, vol. 1 (ICC Exhibit 10, p. 206).

[294] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, "Surface Right-of-Entry to Indian Reserves – Petroleum Industry Easements, Rights-of-Way, Access Roads," November 28, 1967, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 244–54). Emphasis added.

Moore recommends, among other things, that

> (5) Long-term contracts should be issued and subject to recommendation No. 6 *suitable clauses should be provided to allow review at suitable intervals respecting annual rent*, together with relocation in exceptional cases.
>
> (6) A hard look should be taken with respect to the necessity of specifying review periods as to additional terms of compensation. If it is legal and justifiable for a government to pass acts or regulations requiring payments on existing contracts there would be no need to specify review periods....[295]

The record does not indicate who received Moore's paper or whether it was read by regional officials such as Ragan, divisional chiefs at headquarters such as Poupore and Young, or possibly more senior officials such as the Assistant Deputy Minister R.F. Battle. Nevertheless, there was an awareness within the minerals section that the terms of agreements should consider initial payments, annual rents, and review clauses. Further, we know that by February 1968 the Minister of Indian Affairs had turned his attention to this issue and expressed the opinion that the amount of compensation and the manner of payment for pipeline rights of way should be reviewed on a periodic basis.[296]

Still, at this time it is obvious that the process to amend departmental policy to better ensure adequate compensation for easements over reserves was very much in flux. For example, Moore wrote to Ragan on April 5, 1968, stating that the practice in Alberta was still to pay compensation "in the form of an initial payment covering severance, inconvenience and damage and there are few cases where provision has been made for additional compensation or the review of compensation."[297] Moore also criticized some new wording from the Lands Division of Indian Affairs as being too vague: it "indicates that additional payment will be necessary for the second period without stating what form the payment will take." Moore finished by advising Ragan that "there is a strong movement afoot amongst landowners in both

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[295] E.A. Moore, Supervisor of Minerals, Indian Affairs Branch, DIAND, "Surface Right-of-Entry to Indian Reserves – Petroleum Industry Easements, Rights-of-Way, Access Roads," November 28, 1967, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, p. 246). Emphasis added.

[296] J.H. MacAdam, Deputy Administrator of Lands, DIAND, to H.J. Brown, Land Manager, Alberta Gas Trunk Line Company Limited, March 29, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 276).

[297] E.A. Moore, Supervisor of Minerals, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, April 5, 1968, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, p. 280).

Saskatchewan and Alberta to force the companies into payment of annual rents for pipeline easements.[298]

Knowledge of DIAND Officials

It was in this context that R.D. Young, Chief of the Resources and Industrial Division, turned his mind to similar rights of way for power transmission lines when he was asked for his views on the proposed line across the Alexis reserve. Moore's April 5, 1968, memo had referred to a meeting between Young, Ragan, and Moore on February 12, at which they arrived at a consensus that pipeline permits would continue to be granted pursuant to section 28(2) for as long as required but would be subject to a review of compensation at the end of each 20-year period. Young was aware of and supported the change of policy for pipelines.

We view Young's letter of April 24, 1968, responding to the request for his views on the proposed easement across the Alexis reserve as critical evidence in this claim. The letter put MacAdam and Ragan on notice that the Chief of the Resources and Industrial Division was firmly of the view that the Alexis Band deserved an annual rental to be reviewed every five years or less, the whole subject to a 20-year term with a right to renew. Young wrote:

> [w]e should not grant such an easement under the conditions laid down in Clause 5 of the Band Council Resolution [ie. "for as long as the right of way is required for the purpose of Power transmission lines"]. The Region should provide more substantiation of the rental level and a review clause is needed. Perhaps the circumstances warrant a fairly permanent type of tenure for the line owners. However, there should be an annual rental of at least $5.00 per acre to be reviewed at intervals of not longer than five years, so that we can be assured of fair adjustments to current values and that a bona fide need exists – i.e. that the line is not simply abandoned. We can see no reason why a 20-year term with right to renew and 5-year rental reviews cannot apply here.[299]

This letter also triggered a series of exchanges between departmental officials at headquarters and the regional office that help to define the department's knowledge in these matters, and from which we can analyze the resulting fiduciary duty of the Crown.

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[298] E.A. Moore, Supervisor of Minerals, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, April 5, 1968, Federal Records Centre, DIAND, file 1/31-5, vol. 1 (ICC Exhibit 10, pp. 280–81).

[299] R.G. Young, Chief, Resources and Industrial Division, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

First, Turner, the Superintendent in Charge of the Edmonton-Hobbema District, met with Calgary Power personnel and wrote to Young on June 14, pointing out that "[i]n Alberta it is standing practice for all Utility companies, pipe line, etc. to make one payment for easement before work starts and not pay annual rental."[300] At this very moment, in a parallel scenario on the Paul Band's reserves at Wabamun, MacAdam, the Administrator of Lands for DIAND, was telling Ragan that:

> in continuation of its policy to secure the highest return to the Indian people for rights given up in their Reserves, the Branch prefers to approve the grant of rights to use Reserve land for either a short term at a fixed compensation in line with current land values, or for a long term with a sliding scale of compensation to be determined from time to time by negotiation.[301]

MacAdam also told Ragan that the BCR passed by the Paul Band "is an example of the inequitable situation the aforesaid policy endeavours to eliminate." Nevertheless, MacAdam backed away from directing Ragan to try to reopen negotiations between the Paul Band and Calgary Power. Instead, MacAdam left it to Ragan to assess the likelihood of getting the terms of the transaction amended and, if unlikely, to put in a memo the fact that these circumstances are "sufficiently exceptional" to warrant the alienation of rights for a term that may be construed as in perpetuity at a compensation that equals present land values.

Meanwhile, Young continued the exchange of views on utility rights of way when he wrote to Ragan on September 5 criticizing Turner's response. Young stuck to his position that the practice referred to by Turner "must change and, in fact, is changing," and enclosed examples of draft agreements requiring a review period after 20 years. He then stated what he believed to be the department's responsibility in these matters:

> Our responsibility is to protect the Indian interest, and this is not being done when permanent alienation is granted for a fixed sum unless a sale is involved.[302]

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[300] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, DIAND, June 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 286).

[301] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director – Alberta, DIAND, June 24, 1968, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, pp. 287–88).

[302] R.G. Young, Chief, Resources and Industrial Division, DIAND, to R.D. Ragan, Regional Director – Alberta, DIAND, September 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 292).

Ragan replied to Young on November 8, 1968, with the memo, discussed under Issue 1(c) above, that set out the particulars of the five comparable transactions and the calculation of easement compensation using the Blackstock formula. In Ragan's view, the lump sum compensation offered to the Alexis Band of $100 per acre, or $4,296, was more valuable than a short-term annual rental because the latter would bring in only $3 to $5 per acre and the company would reject any payment for injurious affection since the lands were undeveloped. Ragan concluded that the "short term renewable agreement is not in the best interest of the Indian people in this particular case."[303] We note, however, that Ragan, drawing on information supplied by E.C. Holmes, considered a lump sum payment and annual rentals to be alternative options, whereas Young had identified them as possible coexisting terms of an agreement.

By the end of the year, both Turner and Ragan, both of whom were aware of the Band's indecision and possible wish to have a renewable arrangement, wrote memos suggesting ways in which the Band Council could impose an annual rental or a tax on the property.[304]

In January 1969, departmental officials began to draft the proposed permit pursuant to section 28(2). The evidence regarding the initial draft of the permit, in which the lump sum payment of $4,296 was limited to a 20-year term, after which the parties would negotiate a further amount, indicates that the drafter of the permit, R.J. Pennefather, believed he was to make these amendments to the Alexis transaction. As we have seen, however, they did not survive the final draft.[305] Pennefather also penned a draft memorandum for MacAdam's signature explaining the changes. He stated that he had followed the standard practice in relation to oil pipeline agreements in Alberta and, further, that "it is my responsibility to assure that (a) maximum revenue to the Band in the short run together with (b) provision for review at reasonable intervals of the compensation payable, are included in the Agreement."[306]

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[303] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [R.G. Young], Indian Affairs, November 8, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 300).

[304] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315); R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[305] Draft Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., ca. January 17, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 308–9).

[306] Draft memorandum from J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, undated, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 472).

Like the draft agreement, however, the draft memorandum was amended to delete the reference to a renewable term before it executed.

DIAND's Policy Review

The formal review of departmental policy concerning long-term easements on reserve land for major transmission facilities commenced in May 1969 with a letter to all regional directors from J.W. Churchman, Director of the Indian-Eskimo Economic Development Branch. He expressed concern that, insofar as the lands affected by such easements were no longer available to the Band or were injuriously affected in respect of future development, "current practices are inconsistent with the policy of no sale or alienation of Reserve lands."[307] In launching the examination into the policy, Churchman also noted that a few band councils had recently negotiated agreements on a rental review basis, but that the practice was not widespread enough to evaluate the effect of adopting a general policy along such lines.

It is not necessary to review in any detail the varied responses received by DIAND from May until September1969 when the new policy was adopted. A summary of the views of regional officials is contained in Part II. What is important is that the majority of regional directors supported the implementation of short-term agreements with review periods. These responses illustrate that there was widespread knowledge and understanding among regional officials of the inequities of the current policy as it affected Indian bands. But, regardless of the policy in place within DIAND, our primary concern is the actual knowledge possessed by the officials who were directly responsible in 1968 and 1969 for acting in the best interest of the Alexis Band and for recommending a course of action that would most closely reflect that interest.

We note, however, that senior officials did address the problem of how to handle negotiations that were already underway during the policy review period. The Assistant Director of the Indian-Eskimo Economic Development Branch, C.T.W. Hyslop, annotated a memo he had received from H.T. Vergette, Acting Chief of the Lands Division at that time, that he (Hyslop) was of the opinion that

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[307] J.W. Churchman, Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Director, DIAND, May 12, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 324–25).

> [w]here the Region has already entered into negotiation with the company with the consent of the Band Councils on a non-renegotiable basis I do not think that we should make any changes in agreements already approved or under negotiation....[308]

Although in June Hyslop was content to let sleeping dogs lie when it came to bands and utility companies that were already in negotiations on the terms for a right of way agreement, by August he appeared to support the need for a new policy for future transactions. In a further memo to Vergette, Hyslop commented:

> It has been the Department's recent policy I understand not to alienate land for long periods of time either by lease, easement, permit, right-of-way or other occupation without opportunity for renegotiation of compensation. *This I believe is viewed as part of the trust function* where resistance is given for the most part to alienation by fee simple or otherwise unless the land use is clearly in the public interest as for instance in the case of public roads or highways where the Indian reserve lands benefit from such alienation.[309]

Although the meaning of Hyslop's direction to Vergette on how to handle new easement transactions pending the adoption of a revised policy is somewhat unclear, Hyslop appeared to suggest that the "recent policy" of not alienating land indefinitely without a review period should be followed in order to get "the best possible terms for the Indians," even though it would "not be popular with utility companies."[310]

Thus, at the director and assistant director level within DIAND, officials were mandated to come up with a new department-wide policy to better protect the Indians' interest in matters of rights of way for transmission lines. On a parallel stream, the officials responsible for overseeing the transaction concerning Calgary Power and the Alexis Band, notably Young, MacAdam, and Ragan, recognized that the Band had not negotiated the best possible terms for itself. Yet, on the recommendation of Ragan, the Regional Director for Alberta, the decision was made at headquarters to proceed with the approval of the right of way permit over IR 133 for a lump sum payment only. M.G. Jutras, writing on behalf of Ragan, justified the recommendation on the basis that it was "in accordance with the Band Council's wishes and further substantiated by our previous memo on the subject."[311]

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[308] Handwritten marginal note from C.T.W. Hyslop, Assistant Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, Indian Affairs Branch, DIAND, on letter of June 6, 1969, from Vergette to [Hyslop], Assistant Director, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 336).

[309] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, August 11, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 356). Emphasis added.

[310] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to H.T. Vergette, Acting Chief, Lands Division, DIAND, August 11, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, p. 356).

On September 24, 1969, the very day that Hyslop released the department's new policy on rights of way over reserve lands for transmission line purposes, the Minister of Indian Affairs forwarded the recommendation concerning the Alexis Band to the Privy Council.[312] The Order in Council approving the right of way over the Alexis reserve was granted on October 1, 1969. Unlike the 1959 and 1967 distribution lines, the grant was pursuant to section 35 of the *Indian Act*.

The new policy preceded the Alexis approval by one week but did not apply to it. The new policy required a review of compensation at least every 20 years, subject to attempts to negotiate shorter review periods. It required officials from the development and land use sectors of DIAND to provide advice to band councils and also specified that staff were to explain the long-term advantages of being able to renegotiate rentals. Finally, and most relevant to this claim, the policy advised regional directors that, with respect to negotiations that were already or almost complete on the basis of a lump sum payment, "we will be unable to refuse these agreements entered into in good faith."[313]

Findings

The totality of the evidence, most of which is contained in DIAND records, leads us to the conclusion that the majority of officials concerned with the Alexis transmission line agreement knew or ought to have known that the terms of the Alexis Band Council Resolution were unjust and not in the Band's best interest. We have no hesitation in stating that certain individuals, including R.G. Young, were determined to obtain the best possible deal for the Alexis Band and acted responsibly throughout. Why Young's advice was ignored and why the Alberta Regional Director's views were preferred is unknown. What is important is the fact that Young's advice and the results of DIAND's policy process were known by the very people with the mandate to provide a recommendation to the Minister of Indian Affairs on the approval of the Alexis permit.

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[311] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

[312] Jean Chrétien, Minister of Indian Affairs and Northern Development, to Governor General in Council, September 23, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 359–60).

[313] C.T.W. Hyslop, Acting Director, Indian-Eskimo Economic Development Branch, DIAND, to Regional Director, DIAND, September 24, 1969, Federal Records Centre, DIAND, file 1/31-1, vol. 2 (ICC Exhibit 10, pp. 362–63).

The terms of a departmental policy, old or new, cannot shield the Crown when it concerns the Crown's duty to First Nations. In this instance, there was a sufficient pool of knowledge within DIAND of the inadequacies of the current policy that the Crown's agents had a duty to try to have the deal renegotiated, to provide for either annual payments subject to review or a combination of a lump sum and annual payments. The record shows that Turner met with only one of the parties, Calgary Power, in June 1968, and only visited the reserve some three months later to get Band Council approval for the plan of survey.

Turner's evidence – that he went back to the Band Council for a second time some time prior to December 16, 1968, and reported that it was satisfied with the arrangement – would carry considerable weight if not for the comment in the same memo that the Band was indecisive about what it wanted. This must be interpreted in light of the absence of any evidence that officials met subsequently with the Band Council to discuss the reasons for its indecision or that officials followed up with Turner's request to draw up a draft agreement for further discussion with the Band and Calgary Power. For these reasons, we do not interpret Turner's statement that the Band was satisfied with the arrangement as evidence that the Band Council had been given information and advice about its options and was making an informed decision.

Similarly, we find that the most reasonable interpretation of Jutras's remarks (on behalf of Ragan), that the recommendation to proceed with a lump sum was "in accordance with the Band's wishes," is that he was referring to the Band's original wishes as expressed in the BCR, not the product of subsequent advice from DIAND officials.

Not only did DIAND officials have a duty to negotiate a better deal on behalf of the Band if possible, they also had sufficient time to do so, given the 15 months between the BCR and final approval of the transmission line right of way. In addition, the Alexis Band Council would have relied heavily on DIAND advice in order to understand the options that were available for the purpose of negotiations. Yet, while DIAND officials were locked in a heated debate over its policy on transmission line easements, we find little evidence that any of this information was ever shared with the Band Council. The Council was kept in the dark regarding its options and continued to be motivated primarily by the short-term jobs that the right of way would bring its way.

It was unfortunate for the Alexis Band that the timing of these events coincided with a transition to a departmental practice that would have better protected its interests. Nevertheless, the duty to act when there was the opportunity to intervene on behalf of the Band remained.

Canada argues that, even if the Band or DIAND had pressed for different terms, utility companies were not in the practice of paying annual fees in addition to a lump sum payment to residents either on or off reserve.[314] That may be true, but there is evidence showing that, first, there was already a movement among Alberta landowners to get better terms for pipeline rights of way and, second, departmental officials were starting to acknowledge that, as Young wrote to Ragan on September 5, 1968, "[n]aturally, there is some resistance from Companies but they will accept these Agreements.[315] In the case of the Alexis reserve, it is quite possible that Calgary Power would have renegotiated the deal with the Band and the Crown if that alternative had been cheaper than routing the transmission line around the reserve. Yet the correspondence, in particular the views expressed by some Alberta regional officials, suggests that the Crown was willing to acquiesce to the commercial interests of Calgary Power and put the Alexis Band's interests secondary.

Counsel for Canada would have us conclude, based on a 1974 departmental chart,[316] that DIAND officials used the approach of presenting different options, with their advantages and disadvantages, to bands contemplating an offer of compensation for a right of way. "So it is just a question of balance and a question of judgment," stated Canada's counsel, and "the Band itself influences the ultimate decision that was made."[317] This particular evidence, however, is too remote from the events in question to attribute to it any weight. It was written in 1974, some six years after the Alexis negotiations, and concerns another band. It illustrates that by 1974 DIAND was putting forward scenarios that included renewable terms and a combination of a lump sum and annual payments, but it sheds no light on the advice, if any, that DIAND was providing to bands in 1968, in particular to the Alexis Band.

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[314] Submission on Behalf of the Government of Canada, July 16, 2002, p. 22.

[315] R.G. Young, Chief, Resources and Industrial Division, DIAND, to R.D. Ragan, Regional Director – Alberta, DIAND, September 5, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 292).

[316] J.H. Ready, Superintendent, Economic Development, Edmonton-Hobbema District, DIAND, to A/Head, Land Transaction Section, DIAND, June 11, 1974, Federal Records Centre, DIAND, file 774/31-3-7-133A-1, vol. 2 (ICC Exhibit 10, p. 444).

[317] ICC Transcript, August 20, 2002, pp. 87–90, at p. 89 (Kevin McNeil).

Nevertheless, Canada asks the Commission to find that the Crown acted in the best interest of the Alexis Band in discharging its fiduciary duty, in that the Crown considered the wishes of the Band as expressed in its BCR, considered a lump sum versus an annual rental, conducted a study of land values, and concluded that the transaction was not exploitative.[318]

We respectfully disagree with Canada's conclusion. The Crown's agents knew by 1968 and 1969 that lump sum compensation for an interest whose term is ascertainable but virtually permanent was inadequate. The totality of the evidence contained in departmental memos persuades us that the decision to approve the permit for the 1969 transmission line based on a lump sum payment was made, not because the Crown believed that the deal did not exploit the Alexis Band, but because the transaction had already been negotiated, it reflected the new policy directive on transactions that were already in negotiation, and the Band had given its written consent in the form of a BCR. We find that the Crown had a duty to prevent an exploitative transaction, as enunciated in *Apsassin*, but instead made a deal with Calgary Power that was exploitative of a vulnerable and dependent Band.

We agree with the First Nation that the Crown knew that some form of annual charge was necessary to ensure fair compensation for the Alexis Band. As counsel for the First Nation stated,

> I'm not asking you with 20/20 hindsight to look back and judge compensation at that time. I'm saying, look at what is happening in the department, the opinions that are being expressed at precisely that point in time, and that evidence itself is pointing to the inequity of the compensation that was provided in 1969. *It is the department's own evidence that speaks to the inequity of the compensation....*[319]

Yet, says the First Nation, the department wrongly followed the advice of one person, Ragan, over the views of the majority in DIAND.[320]

Even if the agreement for a one-time lump sum payment was not exploitative, we have agreed with the First Nation that the Crown must also meet the standard set by McLachlin in *Apsassin* – namely, whether a reasonable person of ordinary prudence managing his own affairs would agree to this arrangement. We find on the evidence that, bearing in mind the Crown's competing obligation to act in the public interest, its unilateral authority to approve rights of way, and its knowledge by mid-1969 that lump sum transactions were inadequate, the Crown would have attempted to renegotiate a more advantageous arrangement for itself. The Crown therefore breached its fiduciary duty by permitting Calgary Power to take advantage of the Band's weakness to strike a substantially unfair bargain and by failing to apply its own wisdom and knowledge to the terms of the transaction.

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[318] Submission on Behalf of the Government of Canada, July 16, 2002, p. 25.

[319] ICC Transcript, August 20, 2002, p. 37 (Trina Kondro). Emphasis added.

[320] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 46.

We now come to a set of questions that deal directly with the authority provided to the Alexis Band to impose a property tax on the permittee, Calgary Power, in respect of its rights of way across IR 133.

Taxation Provisions and Minimal Impairment

The Crown inserted into the permits covering the rights of way for the 1959 and 1967 distribution lines a provision that states:

> That the Permittee shall pay all charges, taxes, rates and assessments whatsoever which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the said electric power transmission line or the use by the Permittee of the said lands.[321]

In the Agreement appended to the Order in Council granting the right of way to Calgary Power for the 1969 transmission line, a similar clause appears:

> That the Grantee shall pay all charges, taxes, rates and assessments whatsoever payable by the Grantee or any occupant of the right-of-way which shall during the continuance of the rights hereby granted be due and payable or be expressed to be due and payable in respect of the works or the use by the Grantee of the right-of-way.[322]

Although the taxation clause appears in all three agreements, the questions relating to the Crown's fiduciary duties, if any, to ensure that the Band received revenue in the form of taxes concern primarily the 1969 transmission line.

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[321] Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., November 9, 1959, DIAND, Indian Land Registry, Registration No. R11437 (ICC Exhibit 10, pp. 130–35); Agreement between Her Majesty the Queen, represented by the Minister of Citizenship and Immigration, and Calgary Power Ltd., July 4, 1967, DIAND, Indian Land Registry, Registration No. 055615 (ICC Exhibit 10, pp. 212–17), amended by Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., February 12, 1968, DIAND, Indian Land Registry, Registration No. L1117 (ICC Exhibit 10, pp. 262–64).

[322] Agreement between Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, and Calgary Power Ltd., October 1, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 369–72).

The record is deficient in a number of areas. First, there is no evidence before us explaining the policy and legal reasons for the apparent widespread use of this clause in easement agreements, apart from Canada's statement that inclusion of a taxation provision in an easement agreement was part of the Crown's duty to minimally impair the Band's interest.

Second, the historical record contains no information confirming that DIAND officials explained the terms of the agreement to the Band Council or even sent a copy of the Order in Council and attached Appendices to the Band. Phillip Cardinal testified that they "did not get any kind of a documentation that says that there is an agreement between the Band Chief and Council and Calgary Power or any other document."[323] The testimony of Chief Alexis also suggests that band leaders knew nothing of the taxation provision inserted into the 1969 Agreement and had no understanding of taxing third parties:

> I don't remember anybody talking about taxation or taxation bylaw. Just recently, in the '80s I think, we come to understand taxes, and we've – in the '90s we're try [sic] to develop our own taxation bylaw and it took us about almost ten years to get it into place. It was done just recently, but it was started a long time ago.
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> But at that time [in 1969] I don't think there was an understanding of taxes or anything because we were supposed to be tax exempt....
>
> [W]e didn't even have policies then let alone taxation bylaws.[324]

Given the evidence of the lack of education and legal advice on the reserve at that time, together with the testimony that the people had no awareness or understanding of their right to tax Calgary Power, it is reasonable to infer that DIAND did not make efforts in 1969 or for some years thereafter to inform the Band of its taxation power in the 1969 Agreement. Canada does not disagree with this interpretation but, as we shall discuss below, argues instead that there was no duty to inform the Band of its taxing authority because the Band was legally prevented by the *Indian Act* from exercising it.

Issue 2(b) Duty to Obtain Assessment of Taxes

Was there a duty to obtain an independent assessment of the taxes, rates, charges, or fees being paid by Calgary Power to adjacent jurisdictions for the right of way for the same 1969 transmission line? If so, was that duty breached?

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[323] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 58, Phillip Cardinal).

[324] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 54, Chief Francis Alexis).

Some evidence exists to indicate that the Crown was contemplating some form of tax structure for easements on reserve lands almost one year before the 1969 line was approved. Turner wrote to Ragan on December 16, 1968, concerning the Alexis reserve, advising him that as a result of an amendment to the *Municipal Government Act* of Alberta, "we shall have to look at some type of tax structure, as these installations will be no longer assessed by the Department of Municipal Affairs, as they belong to an Indian Reserve."[325] Ragan in turn sent Turner's memo to MacAdam at headquarters with a covering memo, stating:

> I think it only right that the Band Council should levy a tax on property owned by Calgary Power on the reserve, particularly as the Province has vacated the field. Whether or not it is practical to levy such a tax as a form of rental I am not too sure. It might be more equitable to assess the improvements and to establish a mill rate equal to that of the Municipal District or County. You may have some thoughts in this regard.[326]

The advice on taxation from Turner and Ragan met with an unsympathetic response from MacAdam on April 9, 1969. Although MacAdam took pains to remind Ragan that it was MacAdam's duty to obtain maximum revenues for the Band, he advised Ragan that the lump sum offer of $4,296 bore "no relation to taxation by the Band Council in order to raise revenue for authorized municipal administration costs...."[327] MacAdam's comments imply that, even though DIAND ensured that the clause was in easement agreements, it considered its responsibility to have ended there. MacAdam then shut the door on further discussion by offering this opinion:

> I have reason to believe the Power Company, while having negotiated in good faith, is not expecting at a later date, it should have to pay taxes levied by the Band Council in addition to the compensation moneys already agreed upon. It may well be that in this expectancy, the Company would have altered substantially its offer on a per acre basis.[328]

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[325] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[326] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[327] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

[328] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

This paragraph replaced the draft wording prepared for MacAdam by Pennefather in which he wrote the opposite conclusion, that the company would and should assume its fairly assessed and taxed share. MacAdam ended his letter by suggesting that the matter of taxation in general deserved further serious consideration and that it could be part of the preliminary negotiations, presumably between utility corporations and bands.

The First Nation argues that, "having determined that tax should be levied to ensure fair compensation to Alexis, the Crown had a duty to find [out] what that amount would be," but no evidence exists that the Crown made any efforts to determine, for example, a mill rate equivalent to that used for the adjacent municipality.[329] The First Nation further states that, given that the Crown contemplated a tax as part of the consideration due to Alexis, the Crown failed to follow standard off-reserve practices of local governments by failing, among other things, to obtain annual revenues for the Band through the imposition of a tax.

Canada maintains that the First Nation cannot rely on what it calls the "standard off-reserve practices" of adjacent jurisdictions when it has presented no evidence to substantiate its allegation that it was standard practice in adjacent municipalities and improvement districts to obtain an annual charge or fee.[330]

Canada is correct in arguing that the record is deficient on this point. The First Nation, however, did provide an example of the research that the Crown could have undertaken in 1969 to arrive at a scheme to bring tax revenue to the Band. In preparing its claim, the First Nation asked Fenton Associates Consulting Inc. to provide an estimate showing the taxes that would have been payable since 1968 on the transmission line. The study used tax rates available from Alberta Municipal Affairs, TransAlta Utilities, and Lac Ste Anne County. The numbers show that, if the land had been liable to taxation by Lac Ste Anne and if Alexis had had a taxation bylaw in place, using these rates as a guide, the Band would have received tax revenue for the 6.24 kilometre right of way of approximately $62,000 between 1968 and 1999, the year that Alexis implemented its first taxation bylaw.[331] This document is some evidence that assessment and tax rates for off-reserve locations in the area were available and, more important, that a portion of the same power line that was not a part of the reserve until 1996 had been subject to taxation at these rates as part of Lac Ste Anne County's assessment.

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[329] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 44.
[330] Submission on Behalf of the Government of Canada, July 16, 2002, p. 22.
[331] Allan Fenton, Assessor, Fenton Associates Consulting Inc., to Jerome Slavik, Ackroyd, Piasta, Roth & Day, September 6, 2000 (ICC Transcript, Exhibit 14, p. 11).

From the evidence available, we can ascertain that the Crown could have researched the terms of a suitable tax regime on behalf of the Band but did not do so because there was no agreed-upon policy to become involved in the implementation of tax schemes on behalf of bands. In circumstances in which a band had received adequate compensation, this failure to act might not have been a breach of a fiduciary duty; however, in the case of the Alexis Band, we are of the view that an annual return with periodic reviews was recognized by the Crown as necessary to provide adequate compensation to the Band. It therefore became part of the Crown's duty to investigate all possible alternatives, including taxes or grants in lieu of taxes, in order to protect the Indians' interest in the agreement that the Crown had negotiated with Calgary Power.

The Alexis Band was not aware that adjacent, non-reserve jurisdictions were receiving tax revenues from Calgary Power for the next three decades. The Crown, in contrast, could have obtained this information readily and considered its and the Band's options. By not doing so, it breached a fiduciary duty to the Band.

Issue 2(c) and (d) Duty to Obtain Annual Revenues and Minimally Impair

Was there a duty to obtain annual revenues by means of taxes on Calgary Power? If so, was that duty breached?

Was there a duty to minimally impair the Band's interest in the reserve lands granted to Calgary Power for the 1969 right of way? If so, was there a breach of that duty?

From the perspective of the Alexis Band, the lump sum payment of $4,296 and the promise of jobs to clear the 1969 line may have seemed like a good bargain, given the poverty and unemployment on the reserve. But the Alexis Band Council lacked information in a number of key areas. First, it did not know the strengths and weaknesses of Calgary Power's bargaining position. Second, it did not know what the Crown knew, that by 1968 agreements with pipeline and utility companies providing for lump-sum payments in return for a long-term interest in reserve land were recognized as inadequate compensation to bands. Third, it did not know that adjacent municipalities would impose annual taxes or similar charges for the same transmission line. Finally, it appears that it did not even know that the Crown had written into the permit a taxing provision that would enable the Band itself to collect taxes or other charges in future from Calgary Power.

DIAND officials knew all of these things. They also knew that even though a taxing clause had been written into the permit, the Alexis Band would have been barred by the *Indian Act* from implementing this clause. Prior to amendments to the *Act* in 1988, a band council was permitted to make bylaws for the assessment and taxation of interests in reserve land only if the Governor in Council declared that the band had "reached an advanced stage of development" and the Minister had approved.[332]

Paradoxically, the only option that the Crown provided to the Alexis Band that could have remedied the problem of inadequate compensation was the very power that was denied it until that provision was amended 20 years later.[333] According to Canada,

> no Order in Council declaring that the Band had reached an advanced stage of development was located. The evidence is to the contrary, namely, the counsellors of the day (1969) were illiterate and totally relied upon the Crown for advice and direction.[334]

With that assessment the First Nation entirely agrees, noting:

> At the same time that the Crown was looking at tax it was describing the Band as in need of guidance to attend to its affairs with basic competence. Obviously, this was not a Band that Canada was going to assess as being at an "advanced stage of development" at any time soon.[335]

The First Nation makes the argument that the Crown had the sole discretion to allow the Alexis Band to implement a tax on Calgary Power because of the limitation in section 82 of the former *Indian Act*.[336] According to the First Nation, when Canada entered into the agreement with Calgary Power knowing that the taxation power was unavailable to the Band, Canada should have worked with the Band to implement a tax regime or restructured the agreement with Calgary Power to provide for some form of annual payment.[337]

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[332] *Indian Act*, RSC 1952, c. 149, s. 82(1), as amended by SC 1956, c. 40, s. 21.
[333] *Indian Act*, RSC 1985, c. I-5, s. 83.
[334] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.
[335] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 44.
[336] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 47.
[337] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 40.

Canada concludes that the legislative bar to exercising the Band's taxation power means that no fiduciary duty existed to advise the Band of its power or to assist it in any way to implement a taxation scheme.[338] Canada argues that the only fiduciary obligation regarding taxation in these circumstances is a duty to minimally impair the interest in the land and this, says Canada, was satisfied when the Crown preserved the Band's taxation jurisdiction. The Crown, says Canada, met its duty to minimally impair the Band's interest, as articulated in the *Osoyoos Indian Band v. Oliver (Town)* case, by inserting the taxation clause into the permit and had no further fiduciary duty to advise the Band or implement a taxation scheme.[339]

As we noted above, the *Osoyoos* case concerned the authority of the Osoyoos Indian Band to tax land within its reserve on which an irrigation canal had been constructed, pursuant to an expropriation under authority of section 35 of the *Indian Act* in favour of the Province of British Columbia. The issue concerned whether the expropriated land became surrendered land or remained part of the reserve. The majority held that only a statutory easement had been granted and the land remained reserve land, thereby enabling the Band to impose a property tax on the province. The case did not deal directly with the question of whether there was a positive fiduciary duty on the Crown to take steps to enable the Band to implement a taxation regime when it inserted the taxation clause into the permit. Nevertheless, when applied to the facts of this claim, the principles cited by Iacobucci J, speaking for the majority, are helpful.

After concluding that the fiduciary duty of the Crown is not confined to instances of surrender, Iacobucci J reasoned that, in the case of section 35 expropriations, a fiduciary duty arises on the Crown to grant only the minimum interest required to fulfill the public purpose, thereby ensuring minimal impairment of the band's interest. After reviewing the special features of the Indian reserve lands that take them outside the realm of standard commercial transactions, notably their unique cultural component and the fact that the band cannot unilaterally replace reserve lands, Iacobucci J concluded that the Crown's duty is not simply confined to ensuring appropriate compensation.[340]

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338 Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.
339 Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.
340 *Osoyoos v. Oliver (Town)* 2001, 206 DLR (4th) 385 at 406 (SCC).

We note that the findings of the majority are premised on the fulfillment of two fiduciary duties, the first, to ensure that appropriate compensation is received, and the second, to ensure that the band's taxation jurisdiction is preserved in order to enable "a continued ability to earn income from the land." The duty translates into not taking a surrender when an easement will suffice and in preserving the band's ability to tax the company that is occupying reserve land. As we indicated earlier, however, *Osoyoos* is limited in its application to this claim in that it does not set out an exhaustive list of the possible duties owed in an expropriation.

We agree with Canada that the Crown met the duty to minimally impair the Alexis Band's interests. In the 1969 transmission line claim, however, the Crown did not fulfill another duty articulated in *Osoyoos*, the duty to ensure that the Band received appropriate compensation, given the Crown's own understanding of what constituted adequate compensation at that time. Having failed to provide for annual returns to the Band in the agreement with Calgary Power in addition to or instead of a lump sum payment, the only viable recourse open to the Crown was to make efforts to enable the Band to receive tax revenues pursuant to its taxing authority. This the Crown failed to do.

By comparison, the terms negotiated by the Crown for the 1959 and 1967 distribution lines were found to be adequate. The Crown, therefore, had no further duty with respect to those agreements to assist the Band to obtain tax revenues, although the Crown should at least have advised the Band that this power existed and would be available once the Band had the capacity to exercise it.

What steps could the Crown have taken to ensure that the Alexis Band received annual tax revenues from Calgary Power in light of the prohibition on "less developed" bands collecting their own taxes? Once the opportunity to restructure the agreement with Calgary Power had passed, the Crown ought to have found ways to bring tax revenues to the Band using the taxation clause. The Band itself was barred from taking this step and, as a practical matter, it is doubtful that it would have had the capacity to do so on its own. But by negotiating the taxation clause with the full knowledge that the Band could not exercise it, the Crown placed itself in a position in which it had a duty to collect the taxes or payments in lieu of taxes on behalf of the Band. Although this may not have been common practice with respect to utility interests on reserves, the circumstances of this Band and the timing of the agreement between DIAND and Calgary Power point to the necessity of the

Crown taking remedial action to preserve the Band's best interests. Precedent for the collection of taxes or similar payments on behalf of bands can be found in the Crown's practice of collecting royalties on behalf of bands with oil, gas, and mineral interests, and DIAND's receipt of revenue from agricultural leasing agreements on behalf of bands. We also note that the report from Fenton Associates indicates that TransAlta Utilities paid "tax equivalencies on behalf of Alexis to INAC [DIAND] for tax years 1997, 1998, 1999 and 2000," in respect of a portion of the transmission line on land that was recently added to the reserve.[341]

Issue 2(e) Duty to Assist with Taxation Bylaws

Was there a duty to assist the Band to draft and implement appropriate taxation bylaws in the years following approval of the permit for the 1969 line? If so, was there a breach of that duty?

We have found on the evidence that the Alexis Band did not understand the concept of taxing third parties, was not told that it had a taxing authority under the agreement between the Crown and Calgary Power, and, even if it had known, did not have the internal structures necessary to implement a taxing bylaw or the legal right to do so under the *Indian Act*. Given these circumstances, the First Nation claims that, having failed to negotiate a term for annual payments to the Band, the Crown ought to have provided the necessary assistance to the Alexis Band in later years to draft and implement its own taxation bylaw.

The First Nation argues, as we have already noted, that the exchange of departmental correspondence shortly before the final approval of the right of way illustrates that certain departmental officials considered the imposition of a tax as "the means of ameliorating deficiencies in the compensation and ensuring some sort of annual payment to the Band."[342] Canada's view, however, is that "this discussion about taxation was an attempt to find a proper value for rental price if it was the option chosen, because the Alexis Band did not have yet the power to tax in 1969."[343]

Although using property taxes as a means of satisfying the requirement of annual compensation was not departmental policy, it did provide a potential remedy in these circumstances. Yet, as the 1999 PHI report indicates, once the agreement between the Crown and Calgary Power was finalized on October 9, 1969, one week after Order in Council approval of the easement, there was "no evidence that the issue of taxation by the Alexis Band of the CPL [Canada Power Ltd] easement was raised with either the Band or the company...."[344]

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[341] Allan Fenton, Assessor, Fenton Associates Consulting Inc., to Jerome Slavik, Ackroyd, Piasta, Roth & Day, September 6, 2000 (ICC Transcript, Exhibit 14, p. 11).

[342] Submission on Behalf of the Alexis First Nation, May 24, 2002, p. 28.

[343] Submission on Behalf of the Government of Canada, July 16, 2002, p. 17.

The oral testimony from elder Phillip Cardinal suggests that DIAND told the Band to "get a bylaw in place"[345] in the late 1970s and 1980s. Chief Alexis, however, could not recall Indian Affairs ever initiating a process to pass a taxation bylaw, because to do so would have cost money: "We need lawyers, we need advisors, we need consultants, and we don't have those kind of resources."[346] Although the testimony suggests that DIAND may have advised the Band that it could initiate a tax scheme as early as the late 1970s, the reality is that this community did not have the necessary resources to understand taxation, to draft a bylaw, or to overcome the *Indian Act* prohibition on certain bands exercising their taxation powers. The record indicates that the Band did not impose taxes on Calgary Power or its successor TransAlta Utilities until the latter half of the 1990s, when, as a result of legal advice and assistance from a lawyer in private practice, the Band passed its first taxation bylaw. TransAlta Utilities commenced paying taxes to the Alexis First Nation in 1997 in respect of the 1969 transmission line, and possibly the 1959 and 1967 distribution lines,[347] but has refused to consider retroactive payments.

Canada argues that no caselaw supports the proposition that the Crown has a fiduciary obligation to advise or assist a band council on exercising its taxation power.[348] Canada relies on the argument that the only fiduciary duty owed by the Crown in relation to taxation is the duty of minimal impairment. As we discussed earlier, however, the duty of minimal impairment, as set out in the *Osoyoos* case, is a duty to preserve the Indians' interest in the land to the extent possible by employing the least intrusive legal instruments. In this respect, the Crown met its obligations.

As we also stated, however, the duty of minimal impairment does not preclude or oust the possibility that other fiduciary duties may arise in certain circumstances. There may be a lack of legal precedents to support the argument that a positive duty arose to assist the Band in the years following 1969 to draft and implement a taxing bylaw; nevertheless, both Gonthier J and McLachlin J in *Apsassin* concluded that the fiduciary duty is a continuing duty that does not end at the date on which the land is alienated.[349] In *Apsassin*, the Crown had an ongoing duty to revoke an erroneous grant of land using authority granted to it by section 64 of the 1927 *Indian Act*.[350]

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[344] Public History Inc., "Alexis First Nation Hydro Right of Way Claims, Historical Report," November 12, 1999, p. 24 (ICC Exhibit 6, p. 28).

[345] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 69, Phillip Cardinal).

[346] ICC Transcript, December 5, 2001 (ICC Exhibit 11, p. 55, Chief Francis Alexis).

[347] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 77–81, Howard Mustus and Chief Francis Alexis).

[348] Submission on Behalf of the Government of Canada, July 16, 2002, p. 27.

Having recognized the unfairness of providing only lump sum payments for transmission line right of way agreements prior to finalizing the Alexis deal, the Crown had the ongoing duty and the ability to correct the problem and recoup some of the losses to the Band over time. In our view, the section 82 prohibition, a matter totally within the Crown's discretion, cannot be used as a defence for inaction when the Crown had both an ongoing fiduciary duty to correct an inadequate agreement that it had made on behalf of the Band and the ability to right a wrong. As counsel for the First Nation put it:

> [The Crown] can't come back and re-negotiate after they have closed the deal. Taxation is a somewhat different situation. They could have stepped in at any point in time and addressed that issue and at least tried to mitigate some of the damages that were being experienced by the Band.[351]

Canada's counsel, however, argues that there is no link between obtaining adequate compensation and implementing a tax scheme:

> The question of adequacy of compensation under Section 35 that applies [is], "What is the interest in land that is required to satisfy the public purpose or the value of the land ... being taken." And once that is determined the question is: What is that interest worth? And then you secure payment of that interest. The question of a taxing by-law on the other hand, is related to how [a] First Nation wishes to govern its land.[352]

In contrast to agreements for compensation, says Canada's counsel, First Nations are given the power to implement a wide variety of bylaws in their discretion, subject to section 82. As such, why, asks counsel, would the law impose a positive duty on Canada to enact such bylaws?

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[349] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 204–5 and 232–33, [1995] 4 SCR 344 at 365–66 and 404–6.

[350] *Indian Act*, RSC 1927, c. 98, s. 64.

[351] ICC Transcript, August 20, 2002, p. 46 (Trina Kondro).

[352] ICC Transcript, August 20, 2002, pp. 105–6 (Kevin McNeil).

We agree that, given the wording of the taxation clause, its primary purpose appears to be to compensate the First Nation for Calgary Power's continued use of the land over time, as well as to raise money for related administrative costs to the First Nation. As such, taxation revenues are not to be confused with annual payments as part of an agreement to expropriate. We also agree in principle that the Crown does not have a duty, in the words of Canada's counsel, to "start implementing all kinds of bylaws for First Nations."[353] On the particular facts of this claim, however, assisting the Alexis Band to adopt and implement a taxing bylaw, including helping it build capacity, would have provided some recompense to the Band for the failure to obtain a renewable agreement for annual payments. We conclude, therefore, that the Crown breached a continuing fiduciary duty to assist the Band to obtain tax revenues in the years following the 1969 agreement.

Issue 2(f) Duty to Obtain Informed Consent

Was there a fiduciary duty to obtain the Band's informed consent to the 1969 transaction? If so, was that duty breached?

According to section 35 of the *Indian Act* and the provisions of the Alberta *The Water, Gas, Electric and Telephone Companies Act*, there was no statutory requirement on the part of the Crown or the expropriating authority to obtain the consent of the Band to the 1969 transaction. Nevertheless, DIAND had a practice of seeking a band's consent before requesting Governor in Council approval of an agreement between the Crown and the expropriating authority. Further, although we have found that DIAND officials were likely not involved in the discussions resulting in the Band Council Resolution, they ultimately relied on the resolution as evidence of the Band's true intent.

No doubt, the Band Council members believed that their consent was required. After all, Calgary Power had sought their consent on two previous occasions in order to gain access to the reserve through rights of way to bring electricity to the school and houses.

Neither the written record nor the community evidence indicates whether the Band Council discussed the rationale for providing its consent to the right of way. Phillip Cardinal testified that he remembered that time period and talk by Mr Johnson and Mr Sim about Calgary Power's willingness to pay the Band some money for running its line through the reserve. Mr Cardinal also recalled that only one Councillor, J.B. Mustus, opposed the transmission line:

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[353] ICC Transcript, August 20, 2002, p. 106 (Kevin McNeil).

> we were told that they were going to move power from Wabamun to Wabasca, and that power line – they needed that power line to go across the Reserve, I guess, to make it as close as possible, I suppose. And that's when he [J.B. Mustus] didn't think that would be good for the Band. The rest of the Council didn't, and he was just in opposition to having that line go across the Reserve.
>
> ...
>
> I don't think they were in opposition because of the – because of no employment on the Reserve and stuff like that. They wanted to get whatever they can for the membership, I suppose.[354]

When asked whether there was a discussion in the community about the 1969 transmission line, Mr Cardinal replied:

> there was never any kind of dialogue, I guess, between the representatives from Trans-Alta – not Trans-Alta but Calgary Power at that time, between those people and the membership of the Alexis Band or the leadership. There was none. There were no posters or nothing like that or no kind of information.[355]

Although the community evidence is inconclusive, it does suggest that the Band Council had an honest belief that it was being asked to give consent to the right of way permit.

We find that, although the Crown had no statutory duty to obtain the consent of the Band to an expropriation, the Crown's fiduciary duty in this claim included the duty to obtain consent because, in good faith, it had established this practice in its dealings with bands and corporations. To deny the existence of a fiduciary duty in these circumstances would call into question the honour of the Crown in dealings with First Nations.

It goes without saying that consent must be informed to be a valid consent. Hence, the question is whether the Crown satisfied its duty to obtain the Band's knowledgeable and informed consent to the 1969 transaction.

The First Nation refers to a number of important pieces of information that were not communicated to the Band either before or after the BCR was passed.[356] First, counsel for the First Nation points out that the BCR was not accompanied by a map, survey, or any indication of the location of the proposed line other than a reference to the section numbers.

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[354] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 86–87, Phillip Cardinal).

[355] ICC Transcript, December 5, 2001 (ICC Exhibit 11, pp. 87–88, Phillip Cardinal).

[356] ICC Transcript, August 20, 2002, pp. 29–31 (Trina Kondro).

Second, says counsel, there is no evidence in the resolution that the Band Council understood that, unlike the distribution lines, the 1969 line would be granted pursuant to a section 35 expropriation:

> The Council had a right to know what the Crown was giving away. There is no evidence that the Crown made any effort to properly advise the Council or to seek their informed consent.[357]

Third, counsel for the First Nation argues that the resolution stipulated compensation for land that is 100 feet wide, whereas the amount of land to be cleared for the purpose of the line was 150 feet in width. Young's letter of April 24, 1968, to Turner had also raised the apparent discrepancy in the figures contained in the BCR, in that it showed that the Indians were to be compensated for only 41 acres whereas the clearing totalled 61 acres.[358] He complained that no explanation was given, and it would appear from the record that the discrepancy was never adequately explained. Turner's response merely stated that the "Indians were paid to clear big trees outside the right-of-way where there was a danger of them falling on the line."[359] Counsel for the First Nation uses this discrepancy as part of their argument that compensation was inadequate. It is also illustrative, in our view, of the inability of the Band Council to assess whether the offer was fair, given the fact that the amount of land affected by the right of way would be 50 per cent greater than the acreage to be compensated.

Fourth, counsel for the First Nation points out that 15 months passed between the date of the BCR on March 4, 1968, and final Order in Council approval of the 1969 line on October 1, 1969. During this time, says counsel, the Crown could have advised the Band Council to seek better terms in the form of annual rents and renewal provisions, given that the resolution was passed just prior to an "extensive debate within the Department on the need for ensuring annual compensation or implementation of a tax. If there was consent, it was vitiated by the passage of time and the intervening discussions."[360]

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[357] Submission on Behalf of Alexis First Nation, May 24, 2002, p. 49.

[358] R.G. Young, Chief, Resources and Industrial Division, DIAND, to [J.H. MacAdam], Deputy Administrator of Lands, DIAND, April 24, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 285).

[359] T.A. Turner, Superintendent in Charge, Edmonton-Hobbema District, DIAND, to [R.G. Young], Chief, Resources and Industrial Division, DIAND, June 14, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 286).

[360] Reply Submission on Behalf of Alexis First Nation, July 31, 2002, p. 17.

Canada does not address the first three examples of information the First Nation contends should have been available to the Band and instead focuses on the particulars of the fourth item, knowledge that the Band could have or should have demanded annual rents and a renewal provision. Canada argues in its oral submission that a number of documents indicate that the Band knew of the options open to it.

First, says counsel for Canada, a memo from Turner to Ragan dated December 16, 1968, shows that the Band Council was being kept in the loop. The memo states that regional officials "have now had a chance to discuss the right of way application with the Band Council, Calgary Power, and Oil Company officials," that the agreement is satisfactory to all concerned, but that they have "been unable to get the Alexis Band Council to say definitely what they feel should be written into a contract such as this." The memo goes on to say that the Band Council "had indicated that the agreement should be renewed from time to time, and if the annual rental is agreed upon, it can be adequate to cover the tax assessment and make a one 'package deal.'" Finally, Turner asks for an agreement to be prepared to discuss with the Band Council and Calgary Power "clause by clause."[361] This memo, argues counsel, shows "clearly there was discussions [sic] occurring with the Alexis Band Council on a renewable type agreement...."[362]

Second, says Canada, Ragan's follow-up memo to MacAdam, Administrator of Lands at DIAND headquarters, on January 2, 1969, comments that Turner's request to have an agreement prepared for discussion with the Band may present a problem to MacAdam "in view of the indecision on the part of Band Council who indicated their desire for a lump sum settlement by Band Council Resolution...."[363] Third, in a further memo to Ragan dated April 9, 1969, MacAdam points out that "[i]t is my responsibility that maximum Revenue be obtained for the Band" and goes on to state his belief that Calgary Power would be adverse to having to pay an annual tax to the Band Council in addition to an agreed-upon sum.[364] Finally, Canada refers to a July 9, 1969, memo from M.G. Jutras, Assistant Regional Director for Alberta, to MacAdam in which Jutras recommends a lump sum payment only, as it is

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[361] T.A. Turner, Superintendent in Charge, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, December 16, 1968, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 315).

[362] ICC Transcript, August 20, 2002, p. 98 (Kevin McNeil).

[363] R.D. Ragan, Regional Director of Social Affairs – Alberta, DIAND, to [J.H. MacAdam], Administrator of Lands, DIAND, January 2, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 316).

[364] J.H. MacAdam, Administrator of Lands, DIAND, to [R.D. Ragan], Regional Director of Social Affairs – Alberta, DIAND, April 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, pp. 321–22).

"in accordance with the Band Council's wishes and further substantiated by our previous covering memo on the subject."[365]

All of the evidence, argues Canada's counsel, shows that, over the 15 months between the BCR and final approval for the right of way,

> we see quite a debate occurred, and ultimately, a decision was made and ... it was in accordance with what the Band [wanted] to do at the time.[366]

When asked by Commission counsel what evidence, other than the July 9, 1969, memo, Canada relies on to show that the Band Council finally chose the option of a lump sum payment notwithstanding evidence of its earlier indecision, counsel for Canada replied that, even though reports of the Band Council meetings and discussions do not exist, the evidence as a whole leads to an inference that, when the final recommendation was made, DIAND believed that a lump sum payment was the best and was in accordance with the Band's wishes.[367]

After considering the evidence and arguments presented, we agree with the First Nation that the Band Council lacked important information when it passed the BCR – namely, the location of the transmission line and what legal instrument would be used to take the right of way. We also agree that the BCR includes an apparent discrepancy between the amount of land for which compensation was offered and the total acreage that would be required to maintain the right of way. Nevertheless, we concluded that DIAND officials had likely not been involved in the initial discussions with Calgary Power leading to the BCR. Once the plan of survey was prepared, however, DIAND officials did meet with the Band Council to discuss and obtain approval of the plan of survey.

In addition, it is our view that the Band Council's lack of understanding of the legal instrument used to grant the easement to Calgary Power would not have made a material difference to the Band Council's consent as it appeared to understand in general terms the purpose of the grant. Authority for this approach is found in *Apsassin*.[368]

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[365] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

[366] ICC Transcript, August 20, 2002, p. 102 (Kevin McNeil).

[367] ICC Transcript, August 20, 2002, pp. 112–14 (Kevin McNeil).

[368] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), 130 DLR (4th) 193 at 199–200, [1995] 4 SCR 344 at 358–59.

With respect to the apparent discrepancy between the acreage to be compensated and the greater width of land to be cleared for the right of way, this knowledge may well have affected the Band's understanding of the adequacy of the compensation and could have been addressed by the Crown in the intervening 15 months. There is nothing in the record to suggest that the Band Council was aware of the possibility of negotiating some compensation for the additional 50 per cent of the land that was taken. On this point, we agree that the Band Council did not have necessary information to provide its informed consent.

Where we have greatest difficulty, however, is in concluding, as Canada does, that the Band had adequate knowledge of the possibility of obtaining annual payments and a review period. The record does not indicate how the Band learned of the possibility of striking a deal based on annual charges. It may have been DIAND officials who broached the subject or the information could have come from another source. But the Crown's own evidence is clear that the Band was indecisive. As we have found, the statement in the July 9, 1969, memo[369] that the department's final recommendation was in accordance with the Band Council's wishes was more likely a reference to the terms of the BCR than the product of follow-up discussions between the Band and DIAND officials. In recommending approval of the agreement, the Crown's agents relied on the BCR as the expression of the Band Council's consent.

We find that DIAND, to its credit, created a fiduciary duty to obtain consent from the Band Council before proceeding to approve the 1969 transmission line but that, having done so, it had a responsibility to ensure that the Band had sufficient knowledge to give informed consent. The Crown, however, failed to address with the Band at least two important items, the discrepancy between the acreage to be compensated and the acreage required by Calgary Power, and the possibility and advantages of requiring annual charges and a renewable agreement. As a result, the Crown breached its fiduciary duty to the Band.

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[369] M.G. Jutras, Assistant Regional Director – Alberta, DIAND, to J.H. MacAdam, Administrator of Lands, DIAND, July 9, 1969, Federal Records Centre, DIAND, file 774/31-3-2-133 (ICC Exhibit 10, p. 348).

PART V

CONCLUSIONS AND RECOMMENDATION

We have completed our review of the rejected specific claim of the Alexis First Nation. This claim concerns the federal Crown's grants of three rights of way to Calgary Power on or across Alexis IR 133 during the 1950s and 1960s. The First Nation asked this Commission to determine whether the Department of Indian Affairs and Northern Development breached its statutory and/or fiduciary obligations to the Alexis Band when the Crown granted the right of way permits to Calgary Power.

The Alexis First Nation in fact did not argue that the Crown breached its statutory obligations with respect to the 1959 and 1967 distribution lines. In addition, we did not consider the First Nation's allegations that the Crown breached its statutory obligations with respect to the permit for the 1969 transmission line, since the First Nation had raised the particular issue of absence of a valid public purpose as the source of the breach for the first time in its written submissions. Therefore our conclusions pertain only to fiduciary obligations.

After carefully reviewing the extensive documentary record in this claim, and after hearing the testimony of Alexis First Nation elders and the submissions of legal counsel, we have arrived at the conclusions that follow.

Issue 1 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligations, if any, to the Alexis Band in the manner in which the Department granted a section 28(2) permit and a section 35 right of way to Calgary Power to construct power utility lines in 1959, 1967, and 1969?

(a) The Crown did not breach its fiduciary duty to obtain fair and reasonable compensation for the 1959 and 1967 distribution lines.

(b) Based on our finding that the Band was vulnerable in its negotiations with Calgary Power, the Crown breached its fiduciary duty both to advise the Band of the relative strength of its bargaining position in the negotiations for the 1969 transmission line and to keep the Band informed.

(c) There was no fiduciary duty in these circumstances to obtain an independent appraisal of the fair market value of the land to be expropriated for the 1969 line.

Issue 2 Did the Department of Indian Affairs breach its statutory and/or fiduciary obligation to the Band by failing to obtain a reasonable annual fee, rental, or charge as permitted in agreements between DIAND and Calgary Power?

(a) The Crown had a fiduciary duty to prevent an exploitative agreement in 1969; this duty was breached when it approved a transaction for a lump sum payment rather than annual compensation to be renegotiated at periodic intervals, or a combination of both.

(b) The Crown breached its fiduciary duty to obtain an independent assessment of the taxes being paid by Calgary Power to adjacent jurisdictions for the right of way for the same 1969 transmission line.

(c) The Crown breached its fiduciary duty to obtain annual revenues by means of taxes on Calgary Power.

(d) The Crown met its fiduciary duty to minimally impair the Band's interest in the reserve lands granted to Calgary Power.

(e) The Crown had a continuing fiduciary duty, which it breached, to assist the Band to draft and implement appropriate taxation bylaws in the years following approval of the permit for the 1969 line.

(f) The Crown breached its fiduciary duty to obtain the Band's informed consent to the 1969 line, especially since the Crown ultimately relied on the Band's wishes as expressed in its Band Council Resolution.

A number of the fiduciary duties arose in the claim over the 1969 transmission line because of the particular circumstances of this Band, notably its vulnerability in negotiations with the power company, and the convergence of the timing of the permit approval with the advent of a new DIAND policy on easements for major transmission lines. Of critical importance in this claim was the knowledge within the department of the inadequacy of permitting rights of way that were in reality perpetual in exchange for a one-time payment to the Band. Once the Crown permitted the Alexis transaction to proceed under the outdated policy, not only was the deal improvident and exploitative, but it gave rise to other fiduciary duties, such as the obligation to ensure that the Band's taxing authority could be exercised, if necessary by the Crown on behalf of the Band, as a means of recouping the losses resulting from the agreement.

Several officials within the Department of Indian Affairs acted conscientiously in trying to persuade their colleagues to improve the terms of the transaction between the Band and Calgary Power. The department also acted responsibly in minimally impairing the Band's interests by providing for its taxing authority in the future. Nevertheless, the final recommendation to approve the permit was based primarily on the views of one Regional Director when the majority of the concerned DIAND officials at headquarters and in the regions knew that this type of arrangement was unfair to bands.

Although we have not concluded that the Crown breached any statutory duties to the Alexis First Nation in respect of any of the three lines or any fiduciary duties in respect of the 1959 and 1967 lines, the Crown did breach a number of fiduciary duties at the time of and subsequent to the grant of the 1969 right of way. Of these the most important, in our view, was the duty to make efforts to obtain in the agreement a provision for annual payments to the Band, or, failing that, to assist the Band to implement its taxation authority, if necessary collecting the revenues on the Band's behalf.

We therefore recommend to the parties:

That the Alexis First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commissioner	Roger J. Augustine Commissioner	Sheila G. Purdy Commissioner

Dated this 13th day of March, 2003.

APPENDIX A

INDIAN CLAIMS COMMISSION

INTERIM RULING: ALEXIS FIRST NATION INQUIRY
TRANSALTA UTILITIES RIGHTS OF WAY CLAIM
RULING ON GOVERNMENT OF CANADA OBJECTIONS

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Elijah Harper
Commissioner Sheila G. Purdy

COUNSEL

For the Alexis First Nation
Jerome N. Slavik

For the Government of Canada
Robert Winogron

To the Indian Claims Commission
David E. Osborn, QC / Kathleen N. Lickers

APRIL 27, 2000

CONTENTS

BACKGROUND 157

THE FACTS 158

THE ISSUES 162

RULING 162
Issue 1 162
Issue 2 166

CONCLUSION 171

BACKGROUND

This preliminary ruling is in relation to a specific claim filed in October 1995 by the Alexis First Nation (Alexis), in which it is alleged that Canada owes a lawful obligation to the First Nation in respect of three easements over reserve land. Commencing in 1959, these easements were granted to Calgary Power (now Transalta Utilities) to build transmission lines. The Indian Claims Commission (ICC) is ruling on an objection by Canada to the ICC's jurisdiction to accept this claim for an inquiry on the basis that it is not a "rejected" claim.

Since Alexis filed its specific claim, the First Nation's counsel, Jerome Slavik, has requested on several occasions that the ICC accept the claim for review on the basis that it has, in fact, been rejected by Canada. The First Nation alleges that repeated delays in the process of considering the claim within the Department of Indian and Northern Affairs (DIAND) and the Department of Justice constitute a rejection of the claim.[1]

Mr Slavik first requested that the ICC accept the claim for review in a letter dated August 21, 1997, after receiving information that there would be a further "delay of an undetermined amount of time" within the Department of Justice in preparing its legal opinion. Further written requests to the ICC were made on November 4, 1998, February 5, 1999, July 16, 1999, and October 18, 1999. After having received documentation from Alexis, Canada's written objection to the ICC's jurisdiction to review this claim, and further correspondence from both parties, the Commissioners accepted the First Nation's request for an inquiry on October 21, 1999. It is this decision that Canada now objects to as being premature, on the basis that the claim has not been expressly rejected by Canada.

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[1] It is the Commission's understanding that once a claim is submitted to Specific Claims, it is reviewed by DIAND which prepares a "draft historical report" for comment by the First Nation. Once acceptable to the First Nation, the historical report and claim submission are forwarded to the Department of Justice for an opinion. Once DOJ has rendered its opinion, the claim is considered by the Claims Advisory Committee.

Canada did not make formal submissions to the ICC in support of its challenge to the jurisdiction of the Commission to inquire into the Alexis claim. It did, however, set out its position in a letter dated February 7, 2000, from Robert Winogron, Counsel, DIAND Legal Services, to Kathleen Lickers, Senior Legal Counsel, ICC. Both this and the letter of March 1, 1999, from Richard Wex, Senior Counsel, Department of Justice, to David Osborn, Commission Counsel, ICC, represent Canada's submissions.

Counsel for Alexis, Mr Slavik, responded in writing to Canada's February 7, 2000, letter on February 14, 2000, to which he attached his letter of April 22, 1999, to Mr Wex and his letter of January 6, 1998, to Anne Marie Robinson, Director of Policy, DIAND. The panel considered these three letters as representing Mr Slavik's submissions.

The Commission prepared, by mutual agreement of the parties, a document brief of all relevant correspondence and previous mandate rulings of the Commission. The parties accepted this brief without supplementing it with legal argument.

THE FACTS

The panel has reviewed all the material submitted to it in the document brief prepared by the Commission. The following represents the most important facts in the chronology of this claim:

1995

a) On October 4, 1995, the Alexis First Nation commenced a claim pursuant to the Specific Claims Policy of DIAND. The claim alleges that Alexis did not receive any rent, taxes, or other benefit from a transmission line constructed on the reserve pursuant to easements granted to Calgary Power (now Transalta Utilities) beginning in 1959.

1996

b On April 23, 1996, Mr Slavik wrote a letter to Al Gross, Federal Negotiator, Specific Claims West, DIAND, in which he cited the Supreme Court of Canada's decision in the *Apsassin* case (*Blueberry River Indian Band*[2]) to support the First Nation's claim that DIAND breached its fiduciary obligation to the First Nation by failing to obtain a reasonable fee, rental, or charge from the utility for the easement.

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[2] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

c) Shortly thereafter, Specific Claims West completed its preliminary historical report, forwarded it to Alexis, and received a response from Mr Slavik on August 11, 1996. He repeated an earlier request that the claim be fast-tracked through the process.

d) By letter dated October 15, 1996, to Michel Roy, Director General, Specific Claims Branch, DIAND, Mr Slavik summarized his client's view that the Specific Claims historical report was inaccurate and misleading, and asked DIAND to reconsider an earlier decision not to fund Alexis and to review and respond to the report. On December 9, 1996, the funding request was turned down by the Research Funding Division of DIAND. The same letter indicated that the claim had been submitted to the Department of Justice on October 17, 1996, for review.

e) On December 13, 1996, Pamela Keating, Research Manager, Specific Claims Branch, DIAND, wrote to Mr Slavik indicating that DIAND "expects to receive a preliminary legal opinion from the Department of Justice by the end of April, 1997," after which the government would need some time to determine its preliminary position on the claim.

1997

f) In response to a further enquiry by Mr Slavik, Mr Roy reported to the First Nation on June 18, 1997, that the department now anticipated "receiving the draft preliminary legal opinion toward the end of June 1997."

g) On August 21, 1997, Mr Slavik wrote to the Indian Claims Commission indicating that, based on information obtained from DIAND, there would be a "delay of an undetermined amount of time" in processing the Alexis claim. He requested that the ICC "deem the Department of Indian Affairs to have rejected our client's claim" and to proceed with a planning conference.

h) On September 19, 1997, Ms Keating again wrote to Mr Slavik, indicating that "it could take another two to three months before we are able to provide you and your clients with Canada's preliminary position on the claim."

i) On December 23, 1997, rather than providing Canada's preliminary position on the claim, the Department of Justice recommended that additional research be conducted. According to Canada, the First Nation agreed to the research, and DIAND contracted with Public History Inc. to undertake and complete the research by June 15, 1998.

1998

j) On January 6, 1998, Mr Slavik wrote to Ms Robinson. In addition to requesting the status of the claim in the validation process and that it be fast-tracked, he informed DIAND that he would be commencing litigation on this file on behalf of his client. Of particular note is the following statement: *"If at any point the claim is validated during the specific claims process, we will of course, suspend the litigation."* (Emphasis added.)

k) On June 10, 1998, six months later, Alexis filed its Statement of Claim in the Federal Court of Canada, Trial Division.

l) On November 4, 1998, Mr Slavik again requested in writing that the ICC undertake an inquiry into his client's claim.

1999

m) On February 5, 1999, Mr Slavik provided the ICC with documentation regarding the Alexis claim and repeated his request that the ICC accept the claim for inquiry.

n) On March 1, 1999, Mr Wex advised the ICC in writing that,

> Canada was actively addressing this claim when the First Nation chose to pursue its claim before the courts, at which time Canada stopped treating the matter as a specific claim under the Specific Claims Policy.
>
> This decision was entirely consistent with DIAND's "litigate or negotiate" policy. For resource and other reasons, Canada will not simultaneously address claims under one of its claims resolution policies, when a First Nation *actively pursuesits claim in the courts*. [Emphasis added.]

o) In the same letter, Mr Wex advised the ICC that the research project had been nearing completion when Canada was informed in July 1998 that the First Nation had commenced litigation. The letter also indicated that there were subsequent discussions between Canada and Mr Slavik and that Mr Slavik had agreed to place the litigation in abeyance so that Canada could complete its research.

p) The litigation was placed in abeyance by order of the Federal Court on March 10, 1999.

q) On June 14, 1999, Mr Wex wrote to Mr Slavik and to Mr Osborn, indicating that the Specific Claims Branch had resumed work on the claim and expected to be able to provide the research report and documents to Alexis by the end of June 1999.

r) By mid-July, Alexis had not received the research report. Mr Slavik wrote to the ICC on July 16, 1999, requesting that the ICC now deem that the claim has been rejected by Canada and proceed with an inquiry.

s) Cindy Calvert, Senior Analyst, Prairie Claims, Specific Claims Branch, DIAND, wrote to the ICC on July 30, 1999, explaining that, "due to resourcing constraints," the review of the material had not been completed but that it was hoped that the First Nation would receive it "in the next month or so."

t) On October 18, 1999, Mr Slavik reported to the ICC that he had been informed by Ms Calvert that the claim was still in research but that she gave no time frame for its completion. Again, the ICC was asked to intervene.

u) On October 27, 1999, the Commissioners reviewed and accepted the First Nation's request for an inquiry.

v) On November 19, 1999, Ms Calvert informed Mr Slavik that the draft research report and supporting documentation would be sent to Alexis by December 3, 1999, and that further revisions would follow within the next two months.

2000

w) By letter to the ICC dated January 4, 2000, Paul Girard, Director General, Specific Claims Branch, DIAND, indicated that Alexis had received the research report, and that following the First Nation's review, the materials would be sent to the Department of Justice for a further review, after which Canada would be in a position to provide the First Nation with its preliminary position on the claim.

x) By letter dated February 7, 2000, from Mr Winogron to the ICC, Canada challenged the jurisdiction of the ICC to inquire into the

Alexis claim, on the basis that the claim had not yet been rejected by Canada.

THE ISSUES

1 Do the words "already rejected by the Minister" include circumstances in which Canada's conduct is tantamount to a rejection?

If the answer to Issue 1 is yes, Issue 2 must be considered.

2 On the facts of the Alexis First Nation's claim, was Canada's conduct tantamount to a rejection, thereby giving the Commission the authority to review the claim?

RULING

ISSUE 1

Do the words "already rejected by the Minister" include circumstances in which Canada's conduct is tantamount to a rejection?

Canada argues in its letter of February 7, 2000, that the ICC lacks jurisdiction to proceed with an inquiry because the claim has not yet been rejected by the Minister. Canada points to the "empowering legislation" that enables the Commission to inquire into and report on only those claims that have been rejected by the Minister.

Counsel for Alexis argues that a rejection is not confined to a formal dismissal of the claim but can also be the outcome of the Crown's conduct, a sequence of events, or other circumstances. In support of the contention that the ICC has the jurisdiction to determine that a claim has been rejected where there is no express communication to that effect, Mr Slavik asks the panel to refer to previous decisions of the ICC dealing with its jurisdiction to review such claims.

The mandate of the Commission is contained in Order in Council PC 1992-1730, July 27, 1992, which states, among other things, that the Commissioners shall:

> inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy *where that claim has already been rejected by the Minister*.
> [Emphasis added.]

The panel also reviewed four rulings by the ICC in which its jurisdiction to accept a claim had been challenged by Canada. For ease of reference, these rulings are attached as Appendices:

A. *Interim Ruling: Athabaska Denesuline Treaty Harvesting Rights Inquiry: Ruling on Government of Canada Objections*, May 7, 1993, in [1994] 1 ICCP 159.[3]

B. "La Ronge Candle Lake and School Lands Claims", May 9, 1995, by letter from Robert F. Reid, Legal and Mediation Advisor; ICC file 2107-04-01,02,03.[4]

C. "Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits]", in *Inquiry into the Claim of the Mikisew Cree First Nation*, (1998) 6 ICCP 183 at 209.[5]

D. "Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim: Ruling on Mandate Challenge," by letter dated June 28, 1999, from Commissioners Bellegarde, Augustine, and Harper, ICC file 2106-10-01.[6]

The Athabaska Denesuline ruling concerned the question of whether a claim that had not gone through the specific claims process could nevertheless be a "rejected" claim. Canada argued that the Order in Council creating the Indian Claims Commission prevented it from inquiring into a claim unless it had been expressly rejected by the Minister. The panel found, however, that there was "nothing in those terms of reference that confines the Commission to claims rejected in a particular way."[7] In this case, the panel determined that a refusal by the funding arm of DIAND to fund the Athabaska Denesuline effectively prevented the First Nation from going through the specific claims process in the first place, thereby constituting a rejection of its claim.

The La Ronge mandate challenge also dealt with the interpretation of the words "rejected by the Minister." The First Nation's Candle Lake and School Lands claims, together with a treaty land entitlement (TLE) claim, originally proceeded by way of litigation rather than through the specific claims process. Six years after the litigation began, a senior official at DIAND wrote to the Lac La Ronge Band in respect of negotiations on the TLE litigation, adding that "the Department of Indian Affairs is convinced that the lands at Candle Lake and the 'school lands' never became reserves and that a court would concur."[8] Canada argued before the ICC that this letter did not constitute a rejection of the Candle Lake and School Lands claims because a rejection must be in relation to a claim submitted under the Specific Claims Policy. The First Nation argued that it had already given Canada all the relevant information and argument supporting the claims within the litigation, and that the letter amounted in form if not in substance to a rejection of these claims. The panel agreed with the First Nation and also observed that Canada had raised no objection to the Commission's inquiring into the TLE claim, notwithstanding that it too had never been formally put through the specific claims process.

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[3] Reported in (2003) 16 ICCP 3.

[4] See "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," reported in (2003) 16 ICCP 13.

[5] See "Interim Ruling: Mikisew Cree Nation Inquiry, Treaty Entitlement to Economic Benefits Claim," reported in (2003) 16 ICCP 23.

[6] See "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," reported in (2003) 16 ICCP 39.

[7] ICC, *Interim Ruling: Athabaska Denesuline Treaty Harvesting Rights Inquiry: Ruling on Government of Canada Objection* (Ottawa, May 7, 1994), reported (1994) 1 ICCP 159 at 163, also (2003) 16 ICCP 3 at 7.

In Mikisew Cree First Nation, a ruling dealing with an allegation of unreasonable delay, Canada challenged the mandate of the Commission to accept the claim for review before Canada had expressly rejected it. Canada argued that there must be a rejection of the claim on its merits before the Commission can proceed with an inquiry and that, notwithstanding a preliminary review that did not disclose an outstanding lawful obligation by Canada to the Mikisew Cree, no final decision had been made.

The First Nation argued that the Commission, as an administrative body, has the requisite authority to make decisions with respect to its jurisdiction, subject to judicial review of such decisions. As such, the First Nation argued, it falls to the Commission to determine in each case what constitutes a "rejection." A rejection, according to the First Nation, may be expressed in writing or orally or may be "based on the action, inaction, or other conduct, such as the refusal or inability to make a decision of the Crown within a reasonable period of time ..."[9] The panel found on the facts that the delay by Canada in deciding whether to accept the claim was tantamount to a rejection and that the panel therefore had the authority to proceed with an inquiry.

Finally, the Sandy Bay First Nation ruling dealt with the question of the Commission's jurisdiction to hear a claim that, in Canada's view, was a significant departure from the original claim and had not been processed through the specific claims process or rejected. Although Sandy Bay and the Alexis claims differ on the grounds for alleging that Canada has rejected the claim, we note with approval the reference to the discussion of the Commission's mandate in *Lax Kw'alaams Indian Band Inquiry*.[10] The panel there noted that in past rulings the Commission has tended to view its mandate in a very broad manner, that the "mandate is remedial in nature and that [the Commission] has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada's Specific Claims Policy."[11]

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[8] Quoted in "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," reported in (2003) 16 ICCP 13 at 18.

[9] ICC, "Interim Ruling: Mikisew Cree First Nation Inquiry, Treaty Entitlement to Economic Benefits Claim," reported (1998) 6 ICCP 183 at 213; and in (2003) 16 ICCP 23 at 29.

In each of these four ICC rulings a First Nation has asked the ICC to review a claim that has not been expressly rejected as contemplated by the process set out in Canada's Specific Claims Policy as published in 1982 in *Outstanding Business*.[12] In all four cases the Commission concurred with the First Nations' arguments that the Commission had the jurisdiction to review the claim because there had been, as a result of Canada's conduct or other circumstances, a rejection.

We agree with the Athabaska Denesuline ruling that the Order in Council establishing the Commission's mandate does not set out how a claim is "rejected." Further, we agree with the argument expressed by counsel for Mikisew Cree that a "rejection" should not be confined to an express communication, either written or verbal, but can be the result of certain action, inaction, or other conduct. To restrict the mandate of the Commission to a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently.

Finally, we are mindful of previous rulings, in particular Sandy Bay First Nation,[13] in which Commissioners have confirmed their interpretation of their mandate as being remedial in nature. In our view, it is incumbent on all participants in the specific claims process to ensure that Canada's final resolution is arrived at without subjecting the First Nation to a myriad of delays. We remain cognizant of the fact that this process was designed to speed up the resolution of specific claims and to provide the parties with an alternative to expensive and protracted litigation. As such, the process is required to meet the test of expediency and cost savings. It could not have been the intent of Parliament when it designed the mandate of the Commission to prevent a First Nation from utilizing the ICC in circumstances where Canada has not made a decision on acceptance or rejection within a reasonable time. The ability to intervene in these circumstances is wholly consistent with the remedial nature of the Commission's mandate.

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[10] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported (1995) 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," reported in (2003) 16 ICCP 39 at 44–45.

[11] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported (1995) 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," reported in (2003) 16 ICCP 39 at 44.

[12] See DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 23 ff.

[13] ICC, *Inquiry into the Claim of the Lax Kw'alaams Indian Band* (Ottawa, June 29, 1994), reported (1995) 3 ICCP 99 at 158, quoted in "Interim Ruling: Sandy Bay First Nation Inquiry, Treaty Land Entitlement Claim," reported in (2003) 16 ICCP 39 at 45.

The panel confirms the Commission's findings in previous rulings that it has the mandate to make decisions regarding its jurisdiction to review claims. Further, the panel concludes that a claim may be rejected by Canada in more than one way: by an express communication to the First Nation; by the action, inaction, or other conduct of Canada; or in other circumstances where it is unnecessary and would be unfair to compel the First Nation to fit its claim into the strict confines of the Specific Claims Policy.

ISSUE 2

On the facts of the Alexis First Nation's claim, was Canada's conduct tantamount to a rejection, thereby giving the Commission the authority to review the claim?

Where there has been no formal communication of a rejection of the claim, as in this case, it remains to consider whether the action, lack of action, or other conduct of the Crown is sufficient to conclude that the claim has been rejected. Whether the Commission is correct in accepting a request for an inquiry in these circumstances will depend on the facts of each case.

From October 1995, when the Alexis claim was filed with DIAND, until the end of 1996, this claim appeared to be progressing relatively smoothly. The preliminary historical report prepared by Specific Claims West was completed in April 1996 and reviewed by the First Nation by August of that year. Where the process began to break down, however, was in the referral of the claim to the Department of Justice in October 1996 for a preliminary legal opinion. Counsel for Alexis was informed that it would take first four and then six months to complete the legal analysis, after which DIAND would need an unspecified amount of time to formulate its preliminary position. By the end of 1997, the First Nation had still not received DIAND's preliminary position.

It should be added here that, in the early days of this claim, counsel for Alexis asked DIAND in writing on four separate occasions if this claim could be fast-tracked on the basis that it was straightforward and represented an amount less than $500,000. It is clear from the correspondence that Mr Slavik believed that there was in place a fast-track process for simple, less costly claims and that his client's transmission line claim fit this category. Yet, there is no evidence before the panel to indicate that DIAND responded to his repeated requests or even advised him whether such a fast-track process existed.

Instead of providing the government's preliminary position by the end of 1997, DIAND, on the recommendation of the Department of Justice, requested that further historical research be conducted. It is perhaps telling that Mr Slavik had complained about the first research report in mid-1996. The second report was to be completed by June 1998 and, according to DIAND's letter of March 1, 1999, to the ICC, the research was "nearing completion" in July 1998. The entire process, however, was then put on hold because the government learned that the Alexis First Nation had commenced litigation of its claim in the Federal Court.

The panel concludes that from October 1995 until July 1998, a period of close to three years, the First Nation was led to believe that a preliminary position would be forthcoming. Further, the panel finds that there is nothing in the materials filed by Canada that would suggest that this claim is unduly complicated or potentially costly, factors that could justify the significant delays up to that point. When Alexis agreed to further research at the end of 1997, it was with the understanding that it would be completed and shared with the First Nation by June 1998. This did not happen. The First Nation received neither the research report nor DIAND's long-awaited preliminary position, or any indication when it or a final position would be forthcoming. In the circumstances, we conclude that, even if the parties had agreed that the additional research was necessary, the delay by the Department of Justice in recommending that such research was required was unreasonable.

Unfortunately, instead of the process picking up speed in July 1998, it ground to an immediate halt when DIAND learned of the litigation. From then until June 1999, almost one year later, no work was done on the claim. This further delay deserves a closer look, as Canada submits that it was caused by the First Nation's actions.

On January 6, 1998, counsel for Alexis wrote to DIAND advising that the First Nation would be commencing litigation. The letter also stated: "If at any point the claim is validated during the specific claims process, we will of course, suspend the litigation." It is clear that the First Nation was under the belief that the litigation and the claims process could coexist without jeopardizing either one. In his letter to Mr Wex on April 22, 1999, Mr Slavik indicated that the litigation had been commenced to preserve his client's rights and that DIAND was informed shortly afterward that the First Nation "did not intend to proceed with this Statement of Claim in Court providing DIAND expeditiously proceeded with the claims."

It is uncertain when Mr Slavik became aware that all work had stopped on his client's claim; it is clear from the record, however, that DIAND did not respond in writing to Mr Slavik's January 6, 1998, letter to advise him of DIAND's policy, which was to stop treating a matter as a specific claim once litigation started. Given that this policy is not contained in *Outstanding Business* or publicized widely, if at all, it was incumbent on DIAND to advise the First Nation in writing that it was suspending all work on its claim. The panel has no evidence before it that Canada made any efforts either to ensure that the First Nation was aware of the consequences of Canada's decision, or to find a resolution to the problem that Alexis now faced, other than to require that the litigation be placed in abeyance.

Moreover, there is no reason for the panel to question the First Nation's decision to commence litigation in order to preserve its rights. Alexis had received no indication from DIAND that there was any reasonable prospect of a negotiated settlement in the near future. Although the panel agrees that Canada, where possible, should not be required to expend significant resources on two fronts – specific claims and the courts – in respect of the same claim, this situation was not the case here. The uncontroverted evidence of the First Nation is that it informed DIAND soon after the action was commenced that it would not pursue the action, including demanding a Statement of Defence, if its specific claim could proceed expeditiously. Further, Canada's letter of March 1, 1999, appears to confirm that its "litigate or negotiate" policy is designed to deal with a First Nation that "actively pursues its claim in the courts." The panel finds that DIAND's conduct in failing to properly advise Alexis of the consequences of commencing litigation and in failing to adapt its policy in order to permit the claims process to proceed while respecting the legal rights of the First Nation was the primary cause of the further one-year delay.

Alexis put its litigation into abeyance in March 1999 on the representation by Specific Claims that there would be a prompt response to its claim. DIAND

and the Department of Justice resumed work on the claim, undertaking to provide the research and other materials to Alexis by the end of June. DIAND missed this deadline, which was then changed to July. According to a letter dated October 15, 1999, from Mr Slavik to the ICC, the research had still not been conveyed to the First Nation for review and no date for completion of the research had been given. It should be noted here that, once the First Nation received and commented on the second research report, the report and comments would be reviewed a second time by Justice, following which DIAND's preliminary position would be articulated to the First Nation. No estimated time frame for the conclusion of this process was conveyed to Alexis. Finally, in early December 1999, DIAND sent a draft research report to the First Nation with an indication that further revisions would be provided within the next two months. By then, over four years had passed from the filing of the claim.

The panel accepts Canada's explanation in its letter of July 30, 1999, from Ms Calvert to Mr Osborn that, contrary to Mr Slavik's statement in his letter of July 16, it would not take a further 18 to 24 months for the Department of Justice to render its legal opinion to DIAND, as the initial submission and historical report had already been reviewed by legal counsel. Ms Calvert's statement, however, that in general it takes approximately 30 months to complete the legal opinion on a claim is a startling admission, given that the opinion is only one part of the process preceding a decision on validation. This information supports the panel's finding that much of the delay was the result of the Department of Justice's review process.

The ICC ruling in Mikesew Cree First Nation, in which the Commission found that Canada's delay in rendering a decision on validation was tantamount to a rejection, is instructive on the principles that the ICC should apply in this mandate challenge. In that ruling, the panel referred to three cases[14] that set out the factors in determining whether a decision-maker has had a reasonable period of time to make a decision. In summary, the courts have held that what constitutes a reasonable time for a decision depends on the complexity of the issues, the circumstances of each case, and the possible prejudice to either party.

Can the delay in this instance be justified by the complexity of the claim? The Alexis claim alleges a breach of the statutory and fiduciary obligation by the Crown in its advice to the First Nation and in its negotiations with Calgary Power (now Transalta Utilities) to permit a series of easements over reserve land. The claim alleges that, as a result of the Crown's agreement with the utility, the First Nation received no annual payments for use of the easements and therefore lost significant revenues. The parties have not yet agreed upon the issues to be determined by the ICC nor has the Commission had the benefit of reviewing the second research report; nevertheless, it is apparent that the facts and issues in this claim will be relatively straightforward.

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[14] *Re Friends of Oldman River Society* (1993), 105 DLR (4th) 444 (FCTD); *R v Mapleton* (1983), 6 DLR (4th) 191 (NSCA); and *Re Delmas and Vancouver Stock Exchange* (1994), 119 DLR (4th) 136 (BCSC), discussed at page 6 of the ruling.

The panel concludes that, after more than four years, Canada has had sufficient time to determine whether it breached its lawful obligation to Alexis by failing to require the utility to pay an annual charge or rent. In particular, the panel finds that the time taken to complete the legal analysis, after which the First Nation was told only that further research was necessary, cannot be justified in a claim of this magnitude. Compounding this initial delay was the further delay caused by DIAND's policy to suspend all work when Alexis commenced litigation. Even though the research report is now complete and in the hands of the First Nation, Canada has not indicated any timetable for its decision once it has the First Nation's comments. In the circumstances, such a timetable is the least that the claimant should be able to expect.

The panel has also considered whether Canada would be prejudiced by a ruling permitting the ICC to review the claim as a "rejected" claim. In the first place, Alexis has put its litigation in abeyance at the request of Canada. Secondly, the final research report is now complete, subject to further modifications and comment by the First Nation. It is difficult to identify any prejudice to Canada at this time. On the contrary, the Commission's process of consolidating the historical documents and bringing the parties together in a planning conference to discuss the issues and evidence could assist Canada in finalizing its position. Finally, Canada retains the ability to reject the Commission's recommendations. This fact alone negates any ultimate prejudice to Canada by having the ICC review this claim. That being said, the Commission will consider any requests by Canada if it requires additional time to prepare for the ICC process.

Would there be prejudice to the First Nation if the ICC were not to assume jurisdiction over this claim? The litigation has now been in abeyance for more than one year. There is an undetermined time before the First Nation will know if its claim, now four and a half years old, has been accepted or rejected by DIAND. In our view, the longer that Alexis has to wait to advance its claim in either forum, the greater the potential of prejudice to the First

Nation in being able to marshal the necessary evidence, in particular witnesses. In addition, although the panel has no information on the costs to Alexis of pursuing its claim, it is reasonable to assume that those costs will escalate the longer it waits for a decision from DIAND.

Although the panel does not have evidence before it that Alexis has suffered any prejudice to date, to permit this situation to continue would be grossly unfair to the First Nation. Alexis entered the claims process in good faith, in accordance with the principles, as enunciated in *Outstanding Business*, that there would be a fair, equitable, and expeditious resolution of its claim. This has not been the result, nor has the litigation progressed past the filing of a Statement of Claim almost two years ago. Further, given the monetary value of the claim, Alexis could well find that the cost of seeking redress over such a long period outweighs any compensation found to be owing. Even if the First Nation cannot at this time point to any tangible prejudice, we are prepared to conclude that, on balance, there is a likelihood of prejudice to its ability to resolve its claim should it remain any longer in the specific claims process.

For the reasons cited above, the panel finds that, on the facts of this case, the cumulative effect of several delays on the part of the Crown is tantamount to a rejection of the claim. There is no evidence that the delays could be justified by complexities in the case. Further, there is no evidence of prejudice to Canada by this finding, whereas there is a likelihood of prejudice to Alexis if the ICC does not intervene.

CONCLUSION

The response to Issue 1 is: Yes, a "rejection" can include certain circumstances in which Canada's conduct is tantamount to a rejection. The response to Issue 2 is: Yes, on the facts of this case, the delays by Canada were tantamount to a rejection. The Commission therefore retains its jurisdiction to review the claim. The parties will submit all relevant documents to the Commission and a first planning conference will be convened as soon as possible. The Commission remains ready to assist the parties wherever possible to find a resolution to this matter.

FOR THE INDIAN CLAIMS COMMISSION

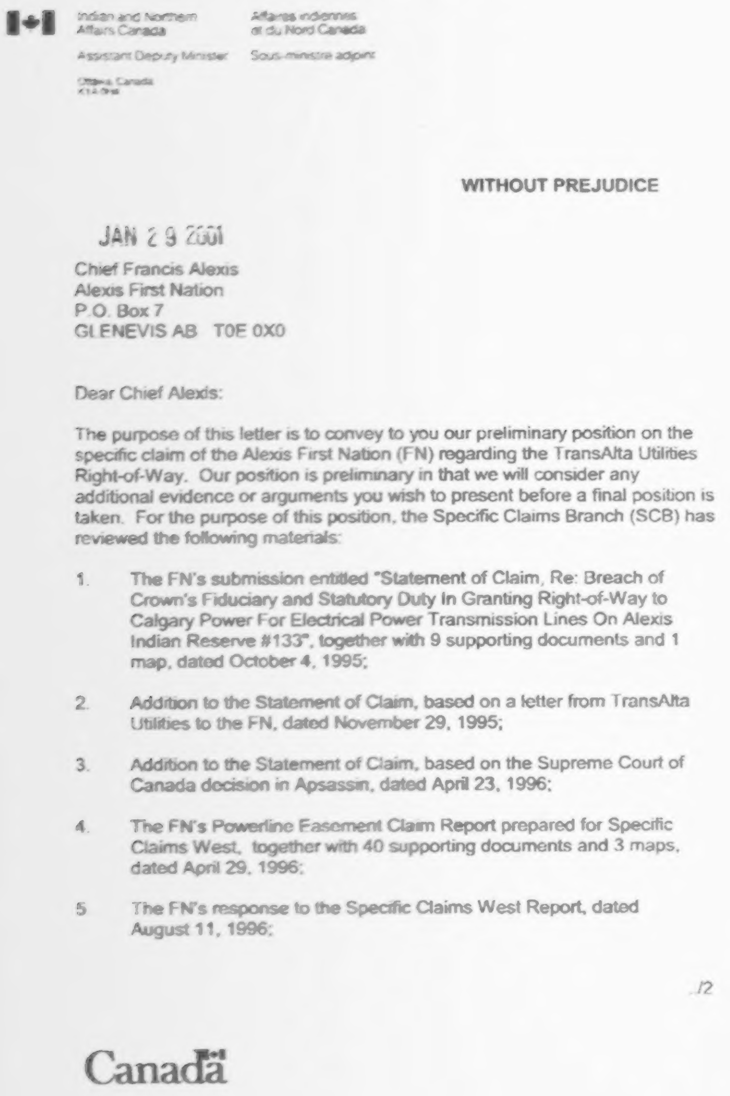
Daniel J. Bellegarde
Commission Co-Chair

Elijah Harper
Commissioner

Sheila G. Purdy
Commissioner

Dated this 27th day of April, 2000.

APPENDIX B



Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
[illegible]

WITHOUT PREJUDICE

JAN 29 2001

Chief Francis Alexis
Alexis First Nation
P.O. Box 7
GLENEVIS AB T0E 0X0

Dear Chief Alexis:

The purpose of this letter is to convey to you our preliminary position on the specific claim of the Alexis First Nation (FN) regarding the TransAlta Utilities Right-of-Way. Our position is preliminary in that we will consider any additional evidence or arguments you wish to present before a final position is taken. For the purpose of this position, the Specific Claims Branch (SCB) has reviewed the following materials:

1. The FN's submission entitled "Statement of Claim, Re: Breach of Crown's Fiduciary and Statutory Duty In Granting Right-of-Way to Calgary Power For Electrical Power Transmission Lines On Alexis Indian Reserve #133", together with 9 supporting documents and 1 map, dated October 4, 1995;
2. Addition to the Statement of Claim, based on a letter from TransAlta Utilities to the FN, dated November 29, 1995;
3. Addition to the Statement of Claim, based on the Supreme Court of Canada decision in Apsassin, dated April 23, 1996;
4. The FN's Powerline Easement Claim Report prepared for Specific Claims West, together with 40 supporting documents and 3 maps, dated April 29, 1996;
5. The FN's response to the Specific Claims West Report, dated August 11, 1996;

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Canada

6. The FN's Hydro Right-of-Way Claims Report prepared for SCB by Public History Inc., together with 223 supporting documents and 15 maps, dated November 12, 1997; and

7. Copy of Easement for Right-of-Way granted by Allan Strathcona Hodgson to Calgary Power Ltd. (CPL) for 5.16 acres for $492.80, dated April 12, 1969.

This letter is written on a "without prejudice" basis and should not be considered an admission of fact or liability by the Crown. Technical defences such as limitation periods, strict rules of evidence or the law of laches, have not been considered in this review. In the event this matter becomes the subject of litigation, the government reserves the right to plead these and all other defences available to it. Please be advised as well that our government files are subject to the *Access to Information Act* and the *Privacy Act*.

Our position is based on a comprehensive review of the facts of the claim as contained in the research conducted by the band and by this office. As a result of our review of the TransAlta Utilities Right-of-Way claim, it is our preliminary position that under the Specific Claims Policy, entitled *Outstanding Business, A Native Claims Policy*, there is no outstanding lawful obligation on the part of the Government of Canada. Briefly, based on the allegations of the FN (set out below and underlined), the reasons for our position are as follows:

1959 Permit

1. Canada failed to obtain any lump sum compensation whatsoever for the land allocated to CPL under the subsection 28(2) Permit in 1959 or to obtain any annual charges, fees or assessments for the next ten years.

   The FN approved, by means of a Band Council Resolution (BCR) dated October 21, 1959, that it would not receive any compensation. This was because t[illegible] FN was the sole beneficiary of the permit as the hydro line in question was constructed to serve the school on the reserve. In addition, the Department of Indian Affairs and Northern Development was absorbing the cost of the transmission line.

.../3

2. Neither the 1959 Agreement nor the subsection 28(2) Permit has a term allowing Canada or the Band Council to impose an annual charge, tax or fee for the use of the reserve land by CPL.

   No compensation for use was necessary, as outlined above. The Band Council had a taxation power pursuant to the *Indian Act*; the failure of the Band Council to exercise this power is not the responsibility of the Crown. The Crown had no obligation to advise the FN of all its various powers under the *Indian Act*. Furthermore, there is no evidence in support of an allegation that the Crown did not advise the FN of its taxing powers.

1967 Permit

3. The July 1967 Agreement contained no term regarding the amount of any annual charge or assessment to be paid by CPL.

   There is no evidence that the total compensation paid by CPL was inadequate.

4. There is no BCR approving or acknowledging the land description amendment set out in the agreement of February 12, 1968.

   Because the amendment to the agreement of February 12, 1968 (to make reference to a particular plan of survey) did not alter the location of the right-of-way as referred to in the April 4, 1966 BCR, the FN's consent was still valid.

1969 Consent to Transfer in Lieu of Expropriation

5. Under the 1969 Agreement Canada could have imposed a charge, rent, or assessment on CPL or stipulated an annual charge, rent or assessment in the agreement. By not doing so, Canada acted contrary to the interests of the Band and violated the fiduciary's standard of conduct to act prudently and reasonably in the best interest of the beneficiary.

.../4

The Agreement provides that CPL shall pay any charges, rents, assessments etc., that shall be due and owing. The Agreement is not a source of an obligation that the Crown impose an annual charge. The total compensation paid by CPL was appropriate and was agreed to by the FN (please see point 9 for more detail regarding the total compensation).

6. The Band was not a party or a witness to the 1969 Agreement between Canada and CPL.

   There is no requirement that the FN be a party or a witness to the Agreement. Furthermore, the FN did consent in the 1968 BCR.

7. At no time did Canada advise the Band that it could pass a taxation by-law or levy an annual fee, assessment or charge against CPL under its powers pursuant to the *Indian Act*, its inherent right to self-government, or the terms of the 1969 Agreement. Canada failed to advise or assist the Band in drafting and enacting a taxation by-law which would have enabled it to acquire substantial tax revenues from the presence of the third party interest on the reserve.

   The failure of the Band Council to exercise its taxing power is not the responsibility of the Crown. The Crown had no obligation to advise the FN of all its various powers under the *Indian Act*. Furthermore, there is no evidence in support of an allegation that the Crown did not advise the FN of its taxing powers.

8. Canada knew, or ought to have known, that in 1969, municipal districts, counties, or improvement districts were charging taxes and assessments on electrical power transmission line easements off-reserve and could have imposed similar rates for on-reserve easements. Further, Canada failed to obtain an independent assessment of the fees CPL was paying to adjacent municipalities and Provincial jurisdictions for easements or rights-of-way for the same transmission line.

   No evidence has been provided to substantiate the claim that local governments or other reserves in Alberta are obtaining annual fees in addition to lump sum compensation. As regards taxation, as distinct from compensation, see point 7 above.

.../5

9. Canada did not follow standard off-reserve practices of local governments by failing to obtain either an annual charge or fee against CPL, as was common practice in municipalities and improvement districts in Alberta. Canada was in breach of its statutory and fiduciary duty in not obtaining annual charges, assessments, or rates from CPL, knowing that the s. 35 Order-in-Council was for an indeterminate and lengthy period of time and that the agreement made provisions for such annual rates or charges.

There is no evidence that it was the standard off-reserve practice to obtain annual charges instead of lump sum compensation. In any event, the evidence demonstrates that the value of the land was established at $70.00 to $100.00 per acre for cultivated land and $30.00 to $50.00 per acre for undeveloped land. The FN received $100.00 per acre for an area of 42.96 acres. Recent information received from TransAlta states that an off-reserve owner was paid $95.50 per acre. The FN itself consented to lump sum compensation in its 1968 BCR. The total compensation received was adequate.

10. With respect to the 1969 Agreement, there is no evidence that Canada advised the Band of the following:

(i) That independent appraisals of the fair market value of the land to be set aside by the subsection 28(2) Permit in 1959 or expropriated pursuant to section 35 of the *Indian Act* were undertaken by Canada and made available to the Band Council on either occasion to assist them in negotiations. Canada failed to act cautiously or prudently by not obtaining an independent appraisal of the fair market value of the expropriated land and subsequently advising the Chief and Council.

As indicated above, the evidence demonstrates that the value of the land was established at $70.00 to $100.00 per acre for cultivated land and $30.00 to $50.00 per acre for undeveloped land. The FN received $100.00 per acre for an area of 42.96 acres. Recent information received from TransAlta states that an off-reserve owner was paid $95.50 per acre. The FN itself consented to lump sum compensation in its 1968 BCR. The total compensation received was adequate.

.../6

(ii) That the Chief and Council were not advised in 1959 or 1969 that they could refuse to grant permission for an easement or right-of-way, nor were they given an idea of the costs which CPL would incur as a result of their refusal to grant such permission. They were not given any advice by Canada on the opportunity costs to CPL and the strength of their bargaining position in regard to granting the right-of-way and the amount of the one-time payment or annual rent.

The Band Council had the opportunity to accept or refuse to grant permission for an easement. Discussions took place as to whether annual payments should be imposed in lieu of lump sum compensation. After arriving at the conclusion that the lump sum compensation of $4,296.00 was in the best interest of the FN, the option of annual payments was rejected and was in accordance with the wishes of the FN.

(iii) That Canada attempted to negotiate with CPL for either a larger one-time payment or imposed, or even suggested to CPL that they would impose, an annual charge or assessment as they were entitled to do, as set out in the agreement.

The Band Council approved lump sum compensation in its 1968 BCR and approved the other easements by BCR. In regard to the sufficiency of total compensation, the evidence demonstrates that this compensation was fully adequate. (please see point 9 above.)

11. Canada did not retain independent legal advice for either the Band or themselves.

There was no obligation on Canada to provide independent legal advice in the present circumstances. There is no evidence to suggest that the FN suffered any damages as a result of the absence of independent legal advice.

12. Canada did not obtain the knowledgeable and informed consent of the Chief and Council to any of the above transactions.

The Band Council indicated its consent through the passing of three BCRs. There is no evidence in support of an allegation that the Chief and Council were not kept informed as necessary.

.../7

13. Canada officials knew that in 1959 and 1969 most of the Chief and Council could not read or write, were not experienced or knowledgeable in the negotiation of such agreements and relied exclusively on the advice on such matters provided to them by Canada. As such, they were vulnerable and dependent, not only upon the advice on the terms of the agreements and permit provided to them by Canada. They were not signatories in any capacity to any of the agreements between Canada and CPL.

There is no legal requirement that the Band Council be witnesses or signatories to a permit of occupation or consent to a public taking. The Band's decisions were respected and there is no evidence that these transactions were exploitative or in any way improper.

14. From 1969 to December 31, 1995, the Band has not received any annual fee, charges, tax, or rent from TransAlta. Further, during this period, the Band was denied use of the land for other purposes and potential sources of revenue.

Lump sum compensation was paid by CPL to the FN for the use of the land, for as long as required for the purpose of the hydro line. That compensation was adequate and equalled or exceeded the sale price that would have been received for the land's use. Additional periodic compensation was not necessary in order for the total compensation to be adequate.

15. Since the granting of the Order in Council and agreement in October 1969, Canada has taken no initiatives or made no efforts to charge any annual fee, rent, or assessment on behalf of the Band against CPL or its successor, TransAlta Utilities, and thus obtain any revenue to which the Band was entitled pursuant to the agreement.

Please see point 9 regarding total compensation and point 14 regarding additional periodic compensation. Canada did not have an obligation to take the initiative or to make efforts to charge any additional fee or to obtain any additional revenue.

Prior to Canada finalizing its position regarding your claim, please be assured that members from this office and the Department of Justice, would be willing to meet with you, members from the Alexis First Nation and their legal counsel to discuss our preliminary position in greater detail.

.../8

I should also note that your FN has the option to submit this claim to the Indian Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection. Should the Alexis First Nation prefer to proceed on that basis, without submitting additional evidence or legal argument, then this letter will serve as evidence, for the purposes of the Commission, that the Government of Canada could not accept this claim for negotiation under the Specific Claims Policy.

Please do not hesitate to contact Mr. Wayne Daugherty, Acting Senior Analyst at (819) 953-3170 to schedule a meeting.

Yours sincerely,

W.J.R. Austin
Assistant Deputy Minister
Claims and Indian Government

APPENDIX C

INTERIM RULING:

Kathleen N. Lickers, Commission Counsel, to Jerome N. Slavik, Ackroyd Piasta Roth & Day, Barristers & Solicitors, and Carole Vary, Diand Legal Services, March 9, 2001

Via Facsimile March 9, 2001

Mr. Jerome N. Slavik
Ackroyd Piasta, Roth & Day
First Edmonton Place
1500-10665 Jasper Place
Edmonton, Alberta, T5J 3S9

- AND -

Ms. Carole Vary
DIAND, Legal Services
10 Wellington Street - 10th Floor
Hull, Quebec, K1A 0H4
Dear Madame and Sir:

Re : Alexis First Nation [TransAlta Utilities]
Our File 2108-01-02

On February 9, 2001, I convened a conference call at the request of Ms. Carole Vary, Legal Counsel, DIAND Legal Services, to discuss the 1998 statement of claim filed by the Alexis First Nation in the Federal Court of Canada and whether the First Nation would continue to hold its claim in abeyance pending completion of the Commission's inquiry. Ms. Vary was particularly concerned because if the First Nation were to decide to actively pursue its litigation, then Canada's statement of defence would be due to the court by February 16, 2001.

After a lengthy discussion, I undertook to provide the Commission's answer to the question of whether it would continue with its inquiry in the face of litigation proceeding simultaneously. On agreement of the parties I put this question to the Commissioners based on our teleconference discussion.

The Commissioners considered the matter and did decide on February 9, 2001 to continue with the inquiry knowing that the Alexis First Nation was in the pleadings stage of litigation in the Federal Court. To allow Canada to meet its February 16, 2001 deadline, I delivered this decision verbally to all parties.

On February 27, 2001, I again convened a conference call. This call was intended to discuss Canada's position, communicated verbally by Ms. Vary, that if the First Nation continued with its litigation and the Commission proceeded with its inquiry, then Canada would only attend the Commission's inquiry as an "observer".

During the course of our February 27, 2001 teleconference, the parties requested the written reasons for the Commission's decision to proceed with the Alexis First Nation inquiry. This letter serves as the written reasons for the Commission's decision.

The mandate of the Commission is contained in Order in Council PC 1992-1730, July 27, 1992, which states, among other things, that the Commissioners shall:

> inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister;
>
> And are authorized:
>
> i) *to adopt such methods, subject to subparagraph (iii), as they may consider expedient for the conduct of the inquiry* and to sit at such times and in such places as they may decide, (emphasis added)
>
> iii) to provide or arrange, at the request of the parties such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim.

The Commission is an independent and neutral third party to a specific claim dispute and once requested by a First Nation, is mandated to review Canada's decision to reject a claim as disclosing no outstanding lawful obligation, a position Canada has taken in the case of the Alexis First Nation. Our mission is to assist the parties in the resolution of outstanding claims. At every stage of our process, the Commission encourages the parties to use methods for dispute resolution in an effort to resolve outstanding issues without the need for a full inquiry. In discharging our function, we are required to consider government policy but we are not bound by it.

The Government of Canada has relied upon its specific claims policy to preclude a First Nation from proceeding before the courts and the specific claims process at the same time. Canada has not however, provided the Commission with the documentary support for this position and we ask that this be so provided. Contrary to the representations of some of Canada's counsel, the Commission's process is not simply an extension of the Department of Indian Affairs, Specific Claims Branch review of a specific claim. If the Government of Canada takes this view of our mandate we request that we be advised, in writing. We are a separate and independent process of inquiry mandated by Order in Council to conduct inquiries pursuant to the *Inquiries Act*. In our view, once rejected, a claimant First Nation can request the Commission to use its power of inquiry and still take action to preserve its rights in the courts of this country.

In the case of the Alexis First Nation, the litigation that is proceeding in the Federal Court is in its initial stages and pleadings have not yet closed. By all accounts, it will be some time before a final judgment is rendered and for this reason, we do not believe our decision to proceed will prejudice either party as we proceed to complete this inquiry. The Commission believes, dependent upon the preparedness of the parties, that its inquiry can be complete *before* a final judgment is rendered. If this were the case, Canada would be in a position to respond to the Commission's findings and recommendations which again may provide the parties with an opportunity to avoid protracted litigation.

Alternatively, should a final judgment be rendered before the inquiry is complete, the parties and the Commission would be bound by the court's determination of the same issues. The Commission faced such a situation in the *Chippewas of Kettle and Stoney Point First Nation 1927 Surrender Inquiry* where Canada's motion for summary judgment proceeded in the

Ontario Court (General Division) simultaneous to the Commission's inquiry. In that case the Commission convened two planning conferences in April and October 1994 in an effort to clarify and resolve matters as much as possible at a preliminary stage. The motion for summary judgment was argued in December 1994. The Commission's inquiry continued into 1995 and culminated with legal argument in October 1995. On August 18, 1995, the court granted Canada's motion for summary judgment, a decision upheld an appeal by the Ontario Court of Appeal on December 2, 1996. The Commission released its final report on March 13, 1997.

In our view, the Commission's process operates independent of and separate from the specific claims process and it is essential to continued public confidence in the administration of justice that the Commission in fact be independent of the specific claims process and its adopted practices, namely requiring the Alexis First Nation to put its litigation into abeyance while the Band proceeds through its inquiry to conclusion.

In conclusion, the Commission is prepared to proceed with the community session stage of the Alexis First Nation inquiry. The First Nation has expressed its willingness to proceed with this session on either March 29/30 or April 5/6, 2001. On February 27, 2001, Mr. Slavik proposed to hold the Alexis First Nation litigation in abeyance pending completion of the oral arguments to the Commission.

Again, depending upon the preparedness of the parties, the community session and legal argument stage of inquiry could be scheduled in the near future. Mr. Winogron and Ms. Vary agreed to take Mr. Slavik's proposal under advisement and respond in writing. We look forward to Canada's expeditious reply.

Yours truly,

Kathleen N. Lickers
Commission Counsel

cc: Chief Francis Alexis, Alexis First Nation
Robert Winogron, DIAND, Legal Services

APPENDIX D

ALEXIS FIRST NATION INQUIRY – TRANSALTA UTILITIES RIGHTS OF WAY CLAIM

1 **Planning conference** Edmonton, July 28, 2000

2 **Interim rulings**

– regarding deemed rejection of claim April 27, 2000
– regarding parallel proceedings in Federal Court March 9, 2001

3 **Community session** Alexis First Nation IR 133, December 5, 2001

The Commission heard evidence from Alexis First Nation elders Howard Mustus, Phillip Cardinal, Nelson Alexis, and Chief Francis Alexis.

4 **Legal argument** Edmonton, August 20, 2002

5 **Content of formal record**

The formal record for the Alexis First Nation Inquiry consists of the following materials:

- the documentary record (4 volumes of documents) (Exhibits 1-10)
- transcript from the community session (1 volume) (Exhibit 11)
- the letter of rejection dated January 29, 2001 (Exhibit 12)
- Alexis First Nation Property Tax By-Law dated July 27, 1999 (Exhibit 13)
- written submissions of counsel for Canada and counsel for the Alexis First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

CHIPPEWA TRI-COUNCIL INQUIRY

BEAUSOLEIL FIRST NATION
CHIPPEWAS OF GEORGINA ISLAND FIRST NATION
CHIPPEWAS OF MNJIKANING (RAMA) FIRST NATION

COLDWATER-NARROWS RESERVATION SURRENDER CLAIM

PANEL

Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Renée Dupuis

COUNSEL

For the Chippewa Tri-Council
Alan Pratt

For the Government of Canada
Laurie Klee

To the Indian Claims Commission
Kathleen N. Lickers

MARCH 2003

CONTENTS

PART I ***INTRODUCTION*** 191
Claim Area Map 193
Mandate of the Indian Claims Commission 195

PART II ***HISTORICAL BACKGROUND*** 198
Background to the First Nation's Claim 198
Establishment of the Coldwater Reserve 201
The Bands' Request for Self-Government and Secure Title to the Reserve 209
Surrender of the Coldwater-Narrows Reserve 212
Sale of the Coldwater-Narrows Reserve 218

PART III ***ISSUES*** 220

PART IV ***CONCLUSION*** 222

APPENDICES

A Chippewa Tri-Council Inquiry – Coldwater Narrows Reservation Surrender Claim 223
B Government of Canada's Offer to Accept Claim 224

PART I

INTRODUCTION

The Chippewa Tri-Council is composed of the Beausoleil First Nation, the Chippewas of Georgina Island First Nation, and the Chippewas of Mnjikaning (Rama) First Nation. In November 1991, the Chippewa Tri-Council submitted a claim regarding the surrender of the Coldwater-Narrows Reservation to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND).[1] The claim alleged that the reservation, a staggered 14-mile strip of land running from the Narrows at Lakes Couchiching and Simcoe west to Matchedash Bay, had never been properly surrendered to the Crown. It was alleged that the 1836 treaty purporting to surrender the land had not been understood by the Chippewas of Lakes Huron and Simcoe, who believed that the treaty would secure their title to the reserve. It was also alleged that the above transaction amounted to a breach of the fiduciary duty owed by the Crown to the Chippewa Tri-Council.

On April 2, 1996, Pamela Keating, Research Manager, Specific Claims Branch East, wrote to Dr Ian Johnson, chief negotiator for the Chippewa Tri-Council, advising him of the federal government's preliminary position on the claim. She advised that the claim did not disclose an outstanding lawful obligation on the part of the Government of Canada and, as a result, must be rejected.[2]

On August 16, 1996, Ian Johnson wrote to Ron Maurice, Legal Counsel of the Indian Claims Commission (ICC), requesting on behalf of the Chippewa Tri-Council that the Commission conduct an inquiry into the rejection of the Coldwater-Narrows Reservation claim and forwarding Band Council Resolutions (BCRs) to that effect from the First Nations.[3] On August 28, Mr Maurice informed Canada of the First Nations' request and of the ICC's decision to proceed.[4]

---

[1] Chippewa Tri-Council, "Coldwater-Narrows Reservation Claim – Summary of Claim," October 1991 (ICC Documents, pp. 1–5).

[2] Pamela Keating, Research Manager, Specific Claims East, to Ian V.B. Johnson, Chief Negotiator, Chippewa Tri-Council, April 2, 1996 (ICC file 2105-18-02, vol. 1).

[3] Ian V.B. Johnson, Negotiator, to Ron Maurice, Legal Counsel, Indian Claims Commission, August 16, 1996 (ICC file 2105-18-02, vol. 1).

The first planning conference took place on November 4, 1996. At the second planning conference, on December 10, 1996, the parties explained their positions in an informal way and determined that further research was necessary. By March 31, 1997, counsel for the Tri-Council had prepared a draft summary of legal questions, which would form the basis of future discussions between the parties. In the meantime, DIAND arranged for additional research to be conducted; this research was deemed necessary for the Department of Justice to develop a position on the legal questions.

The third planning conference was held on December 15, 1997, at which time the parties dealt with questions concerning the additional research. During early 1998, Joan Holmes and Associates Inc. conducted phase I research concerning funding and expenditures on the Coldwater-Narrows Reservation. This work was completed by May. After review by the parties, another planning conference took place on August 7, 1998, to discuss the phase I research and to plan the review of the phase II report, which was to be completed by September of that year.[5]

After a review of the phase II research into the sale of Coldwater lands and the disposition of proceeds, the parties held another planning conference on November 12, 1998. At this meeting, Alan Pratt, counsel for the Tri-Council, undertook to submit any supplemental legal arguments by the end of November 1998, and Laurie Klee, counsel for Canada, agreed to formulate a position on the draft summary of legal questions in the same time frame. Ms Klee also agreed to attempt to have a new legal opinion completed by the end of May 1999.[6]

The legal opinion prepared by Ms Klee was circulated internally at DIAND and the Department of Justice during the summer of 1999; however, in a conference call between the parties on September 13, 1999, Ms Klee informed the parties that the legal opinion had been delivered to DIAND. Pamela Keating informed the parties that an analyst would be assigned to the claim, and that the claim would be placed before the Claims Advisory Committee and, possibly, the senior policy committee. She advised that it was not possible to commit to a deadline for completing this process.[7]

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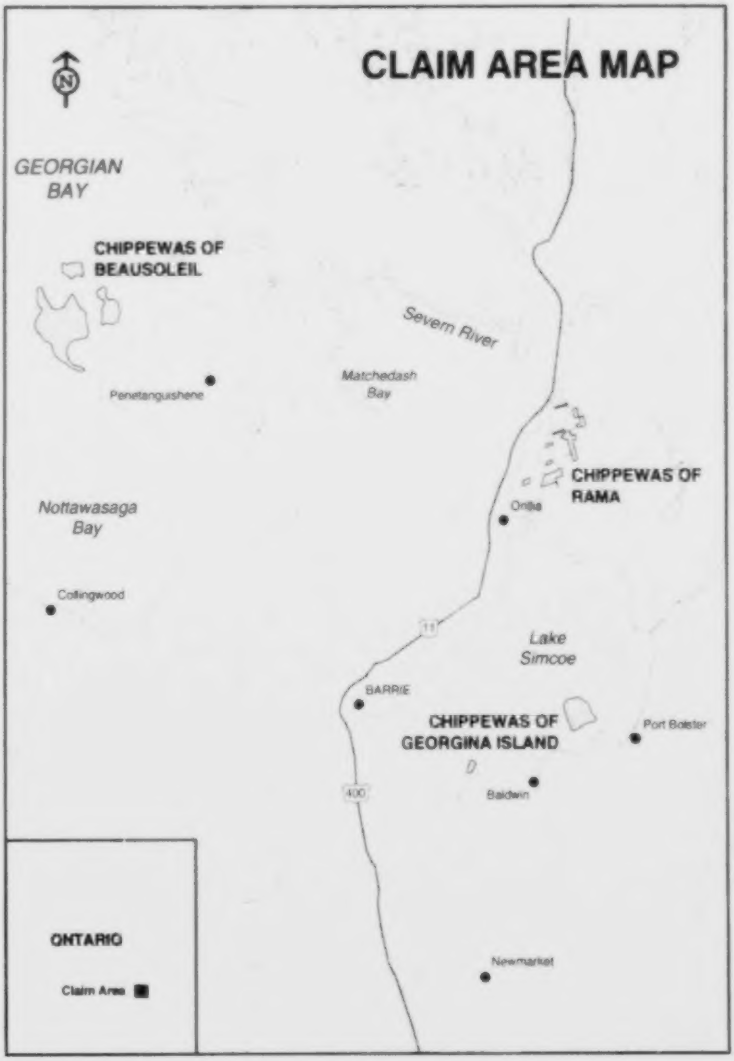
[4] Ron Maurice, Legal Counsel, ICC, to Michel Roy, Director General, Specific Claims Branch, et al., August 28, 1996 (ICC file 2105-18-02, vol. 1).

[5] "Planning Conference Summary," August 7, 1998 (ICC file 2105-18-02, vol. 2).

[6] "Planning Conference Summary," November 12, 1998 (ICC file 2105-18-02, vol. 2).

[7] "Planning Conference Summary," September 13, 1999 (ICC file 2105-18-02, vol. 2).


CLAIM AREA MAP
N
GEORGIAN BAY
CHIPPEWAS OF BEAUSOLEIL
Penetanguishene
Severn River
Matchedash Bay
CHIPPEWAS OF RAMA
Orillia
Nottawasaga Bay
Collingwood
11
Lake Simcoe
BARRIE
CHIPPEWAS OF GEORGINA ISLAND
Port Bolster
Baldwin
400
Newmarket
ONTARIO
Claim Area

Another conference call was held on January 26, 2000, to update the status of the claim, at which time Jeff Ross, senior policy analyst, DIAND, undertook to secure a date for the review of the claim.[8] Subsequently, the parties were informed that the committee would review the claim on February 24, 2000.[9]

Throughout 2000, the claim underwent additional internal review at DIAND, but no answer as to acceptance or rejection was received by the Chippewa Tri-Council. As a result, on July 13, 2000, Alan Pratt requested that the ICC convene a new planning conference to allow Canada an opportunity to provide an update, and the Tri-Council an opportunity to assess its options.[10] A conference call was held on July 26, at which Canada advised that, as the claim was a pre-Confederation claim, it involved unique issues requiring internal review, thereby necessitating the additional time. In the end, the parties agreed that the next conference call would be scheduled for September 13, 2000.[11]

On September 13, a conference call took place as scheduled, with Canada having nothing new to report. Chief Monague, representing the Chiefs of the Tri-Council First Nations, expressed disappointment and called for a face-to-face meeting with Canada. Resumption of the inquiry process was discussed, and a tentative meeting between the parties was scheduled for October 19 of that year;[12] a meeting did not take place. Throughout October and November, representatives of the Tri-Council wrote numerous letters to government officials asking for an explanation of the delay and requesting that the claim be expedited. On December 11, 2000, Laurie Klee wrote to Alan Pratt enclosing additional research conducted by Joan Holmes and Associates Inc. She advised that, as the material had now been received, the review process would resume.[13]

Over the following six months, no further information regarding the claim was forwarded by Canada. As a result, the ICC prepared to convene a final planning conference on October 5, 2001. In preparation, Alan Pratt forwarded a revised summary of legal questions to the parties. In his covering letter, he advised that, in the event that no answer on acceptance or rejection of the claim was forthcoming from Canada, he would add an additional legal question regarding Canada's duty to negotiate in good faith under the Specific Claims Policy.[14] At the planning conference on October 5, 2001, Canada was not able to provide a response on the claim. As a result, the Chippewa Tri-Council asked the Commission to initiate a full inquiry into the claim, but to delay active preparation until January 2002. Ralph Brant of the Commission, who was chairing the meeting, agreed to proceed with the inquiry.[15] A pre-hearing conference was scheduled for January 15, 2002.

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[8] "Conference Call Summary," January 26, 2000 (ICC file 2105-18-02, vol. 2).

[9] Chris E. Angeconeb, Associate Legal Counsel, ICC, to Alan Pratt, Barrister & Solicitor, and to Laurie Klee, DIAND, Department of Justice, January 27, 2000 (ICC file 2105-18-02, vol. 2).

[10] Alan Pratt, Barrister & Solicitor, to the Honourable Robert F. Reid, Mediation Advisor, ICC, July 13, 2000 (ICC file 2105-18-02, vol. 2).

[11] "Conference Call Summary," July 26, 2000 (ICC file 2105-18-02, vol. 2).

[12] "Conference Call Summary," September 18, 2000 (ICC file 2105-18-02, vol. 2).

[13] Laurie Klee, DIAND Legal Services, Department of Justice (DOJ), to Alan Pratt, Barrister & Solicitor, December 11, 2000 (ICC file 2105-18-02, vol. 2).

By agreement of the parties, that pre-hearing conference was postponed until February 25, 2002. At this meeting, Canada's representative advised that the claim was still under consideration by the Minister. Commission staff then explained the next steps in the hearing process, and a staff visit to the community was scheduled for April 15, 2002.[16]

On March 18, 2002, an eighth planning conference was convened, at which the parties reviewed Canada's position on the claim. Canada agreed to accept the claim for negotiation.[17]

On July 23, 2002, Minister Robert Nault of Indian Affairs and Northern Development wrote to the Chiefs of the Chippewa Tri-Council to officially advise of Canada's offer to accept the claim. As a result, the Commission suspended its inquiry into the claim. This report is based upon historical reports and documents submitted to the Commission by the Chippewa Tri-Council and by DIAND. The balance of the record in this inquiry is referenced as Appendix A to this report.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on

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[14] Alan Pratt, Barrister & Solicitor, to Ralph Brant, Director of Mediation, ICC, Felipe Morales, Associate Legal Counsel, ICC, and Laurie Klee, DIAND Legal Services, DOJ, October 1, 2001 (ICC file 2105-18-02, vol. 3).

[15] "Planning Conference Summary," October 30, 2001 (ICC file 2105-18-02, vol. 3).

[16] "Planning Conference Summary," February 25, 2002 (ICC file 2105-18-02, vol. 3).

[17] "8th Planning Conference Summary," March 18, 2002 (ICC file 2105-18-02, vol. 3).

"whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[18]

This Policy, outlined in DIAND's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[19] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims, characterized as "Beyond Lawful Obligation":

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[20]

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

---

[18] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[19] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

[20] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171–85.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

In the late 18th and early 19th centuries, the three bands that today comprise the Chippewa Tri-Council occupied lands on the shores of Lakes Simcoe and Huron, lands that they and other Chippewas, or Ojibwas, had traditionally occupied for many years. As we noted in our report on the Chippewa Tri-Council's Collins Treaty claim,

> "Ojibwa," "Chippewa," "Saulteaux," and "Mississauga" all refer to peoples speaking similar and in some cases the same dialects of the Algonquian language. Although the names were often used interchangeably, as a general rule early settlers used the term "Chippewa" for the people residing around Lake Simcoe, the Bruce Peninsula, Matchedash Bay, and much of the Thames Valley, whereas they generally applied the term "Mississauga" to those living along the north shore of Lake Ontario and in the Trent River Valley.[21]

The Band of Chief Yellowhead, or Musquakie, lived mainly near the Narrows between Lakes Simcoe and Couchiching; the followers of Chief Snake resided mainly at Holland Landing and on Snake Island; and Chief Aisance's people were settled at Coldwater, near Penetanguishene.[22] The three Bands lived apart and acted independently, but met seasonally for tribal councils.

The Ojibwas had been military allies of the French prior to the fall of New France to the British in 1763; thereafter, their allegiance was sought by the British for strategic as well as commercial reasons. Over the next decades, the British gave annual presents to the Ojibwas and other tribes, in order to cement both their friendship and their military alliance against the United

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[21] ICC, *Chippewa Tri-Council Inquiry (Chippewas of Beausoleil First Nation, Chippewas of Georgina Island First Nation, Chippewas of Rama First Nation), Collins Treaty Claim* (Ottawa, March 1998), 10, citing Edward S. Rogers and D.B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994), xxi, 94–96; reported (1998) 10 ICCP 43.

[22] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 27).

States. As well, the British Crown entered into treaties with the Ojibwas, by which the latter ceded territory to the Crown in exchange for annuities or one-time payments. Some of these land cessions were for strategic purposes, but others were to accommodate the burgeoning numbers of white settlers pouring into Upper Canada (Ontario) in the years following the American revolution.

By a treaty made with the Ojibwas at Penetanguishene in 1795, the British had acquired the traditional portage route known as the Coldwater Road for their military needs.[23] Extending from the Narrows at Lake Simcoe to Matchedash Bay on Lake Huron, this route was utilized to transport goods and troops to Georgian Bay between 1795 and 1812. After the end of the War of 1812, however, the military need for the road diminished, and it became an access route for settlers granted lots along its course. The British authorities made efforts to maintain the road, at least for a while, and settlement continued to increase.

The making of peace with the Americans also lessened the British government's need for the military power of the Indians of Upper Canada. As a result, the presents given to ensure the Indians' allegiance began to be reduced. The increasingly dependent situation of Upper Canada's Indians, including the Chippewas, was made worse by the negative influence of some of the more unscrupulous white settlers and traders who had arrived in the region. This state of decline induced British colonial officials to develop a new policy governing their relationship with the Ojibwas and other First Nations, a policy that would have a great impact upon the three Bands of the Chippewa Tri-Council.

Plans designed to reduce the dependency of Indian nations on the government were first proposed in 1820 by the Lieutenant Governor of Upper Canada, Sir Peregrine Maitland. As its central feature, Maitland's plan contemplated the establishment of Indian settlements designed to encourage the inhabitants to become church-going farmers.[24] It was also intended that schools be established, to teach basic literacy as well as skills useful in agriculture and industry. All these benefits were to be provided in a religious and moral context, with the active assistance of missionaries, who were considered a necessary part of the process by which the Indians were to be "civilized."

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[23] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 47).

[24] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1995 (ICC Documents, p. 258, para. 11).

The earliest example of this scheme involved the Mississaugas of the New Credit, who were located to the south of the three Chippewa Bands, and who had been selected by Maitland as the vanguard of the new experiment in Indian civilization. Methodist missionaries were enlisted to assist, and their success with the Mississaugas at New Credit provided impetus for the project to continue.

In 1828, Maitland was replaced as Lieutenant Governor by Sir John Colborne, who sought to continue Maitland's ideas in the form of a new settlement policy. Colborne, convinced that the policy made fiscal sense, was able to persuade his superiors in London not only that it should be maintained, but that it should be expanded to other Indian nations.[25] As a result, the attention of the authorities turned to the Chippewas residing near Lakes Huron and Simcoe, many of whom had already been converted to Christianity by the Methodists. According to the then Deputy Superintendent General of Indian Affairs, H.C. Darling, the followers of Chief Yellowhead had already expressed a desire to "adopt the habits of civilized life," and he recommended that the government pay for a schoolmaster and provide aid in building schoolhouses.[26] The Secretary of State for the Colonies, George Murray, supported the plan, especially since he saw it as a means by which the expense of giving presents could eventually be replaced by the provision of livestock and agricultural implements.[27]

In 1829, after discussion among various colonial officials concerning the proposed Indian communities, Lieutenant Governor Colborne authorized the establishment of a number of Indian settlements. He envisioned the appointment of Indian agents or superintendents with a mandate to collect the Indians into villages, and then to encourage them to divide their lands into lots, begin cultivating them, and send their children to school.[28] One of the planned settlements was intended for the Chippewas of Lake Huron and Lake Simcoe. This community, which was to be located in the vicinity of the Coldwater Road, would become the new home of the three Bands of the Chippewa Tri-Council.

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[25] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 259, para. 11).

[26] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 272–73, para. 5).

[27] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 273, para. 6).

[28] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 278–79, para. 10).

ESTABLISHMENT OF THE COLDWATER RESERVE

In February 1830, T.G. Anderson, who had been a clerk and interpreter at the British outpost of Drummond Island until its transfer to the United States, was appointed superintendent of the new reserve to be established at Coldwater. On February 17 of that year, James Givens, the Chief Superintendent of Indian Affairs, instructed him to lead the three Chippewa Chiefs, Aisance, Yellowhead, and Snake (plus the Potaganasee Chief from Drummond Island) to the Coldwater area to begin establishing the reserve.[29] The land comprising the reserve was near lands already occupied by some members of the three Bands and totalled some 9,800 acres. It stretched for 14 miles from the Narrows of Lake Simcoe in the east, to Coldwater near Matchedash Bay in the west, following the course of the traditional portage route. Two villages were planned: Coldwater at the western or Matchedash end of the reserve, and the Narrows at its eastern end. Chiefs Yellowhead and Snake agreed to settle with their followers in the vicinity of the Narrows, while Aisance and his Band, together with the Potaganasees, were to relocate near Coldwater.[30] The settlement was not only intended to benefit the three Bands and the Potaganasees, however. It was also hoped that the reserve would attract other Indian bands loyal to the British, which were located further west in Ohio, Wisconsin, and Indiana, but which were being pushed out of their traditional territory by the spread of American agricultural settlement.[31]

At the outset, the British authorities intended to survey the reserve into single family farms for the members of the Bands. Before this could be undertaken, however, it was necessary to enlarge and improve the Coldwater Road, which apparently was essentially a path. When tools, oxen, and provisions were provided in April 1830, able-bodied men from all the Bands were engaged to clear and widen the route.[32] Superintendent Anderson had intended to construct a schoolhouse immediately, but when provisions with which to pay the Indian labour required for the job did not arrive on time, the project was delayed.[33] Nonetheless, Anderson made plans to construct a sawmill at Matchedash and to hire a blacksmith at the Narrows.[34]

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[29] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 285, para. 1).

[30] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, pp. 63–64).

[31] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 57).

[32] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 287, paras. 4, 5).

In October 1830, Lieutenant Governor Colborne wrote to his superior:

> I beg leave to state to you the measures that have been this year adopted to carry into effect the system recommended to be pursued, with a view of introducing amongst the Indians of Upper Canada, the industrious habits of civilized life. The three tribes residing on the shores of Lake Simcoe, and near the Matchadash, and the Potaganasees from Drummond Island, have been placed under charge of a superintendent of the Indian department, and urged to clear a tract of land between the Lakes Huron and Simcoe.
>
> I have directed houses to be built for them on detached lots, and they are now clearing ground sufficient to establish farms at each station for their immediate support, from which they will be supplied while they are bringing into cultivation their individual lots marked out for their residence. Agricultural implements have been procured for them, experienced farmers have been engaged to instruct them, and school masters appointed to educate their children.[35]

Although Colborne's report suggested that rapid and unimpeded progress was being made, a few problems had begun to surface on the Coldwater-Narrows Reserve. In July 1830, Chief Yellowhead made a speech (which had been transcribed and forwarded to the Chief Superintendent of Indian Affairs), outlining certain objections to the planned settlement arrangements. The Chief took issue with the authorities' desire to have most of his followers settled in a string along the Coldwater Road, preferring instead a larger planned townsite like that at York (Toronto) for the Indians' houses, with the farmland alone located along the road. As well, he vehemently protested the quality of the workmen engaged by the government to build the houses in question. According to the Chief, most of these men were frequently intoxicated and provided an unpleasant reminder (not to mention a bad example) of the social ills that had plagued his Band in the past.[36]

Superintendent Anderson supported the Chief with respect to the settlement pattern to be established on the reserve, as the original plan would have made it inconvenient for the children to attend school.[37] In addition, he shared the Chief's fears regarding the proximity of liquor in the settler population and those who abused it, and recommended that no more land grants be made to white settlers in the immediate vicinity of the reserve.[38]

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[33] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 285, para. 2).

[34] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 287, para. 4).

[35] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 282, para. 14).

[36] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 293, para. 19).

Notwithstanding these steps, settlers continued to flood into the area, due mainly to the fact that the Coldwater Road was a primary access route from the eastern settlements into the northwestern regions of Upper Canada. Stopping places sprang up near the two Indian villages at either end of the reserve, and alcohol was readily available from the white proprietors. Fur traders took up residence, and band members began to go into debt to them to acquire alcohol and consumer goods. In addition, the settlers themselves traded alcohol with the Chippewas, trespassed on reserve land, and misappropriated crops belonging to the Indians.[39]

Superintendent Anderson was also clearly dissatisfied with the slow progress of house construction. In addition to the issue of the inebriated workmen, Anderson's reports to the Chief Superintendent implied that the main contractor, a Mr Lewis, had misrepresented his ability to carry out the job and was not sufficiently reliable to justify retaining his services.[40]

As well, the focus on religious conversion and instruction as key features of the settlement policy created new problems among the Chippewas. Divisions arose among the Bands as a result of the escalating competition between representatives of the various Christian denominations for the religious allegiance of the Indians of the reserve. This rivalry contributed to unrest among the Chippewa Bands and presented an additional obstacle to the successful development of the community.

Since the early 1820s, the Methodists had achieved great success evangelizing among the Chippewas, beginning with their work among the Mississaugas, largely through the efforts of Peter Jones, a Methodist missionary of mixed white and Mississauga ancestry. By the late 1820s, he had made many converts around Lake Simcoe. As a result, the British could not ignore the Methodists in implementing their Indian settlement policy, despite the fact that many in the colony felt that the Church of England should be the only denomination to receive state support.[41] However, the Methodists fell out of favour with colonial officials as a result of their involvement in opposition politics in Upper Canada. As well, their erstwhile alliance with the American Methodist Church created a perception that they were republican sympathizers. Therefore, despite the colonial government's initial need of the Methodists' assistance, these missionaries were not completely trusted by some officials in power, and, consequently, the Anglican Church was encouraged to gain a foothold among the Chippewas.[42] The first Anglican missionary, the Reverend G. Archibald (or Archbold) arrived at the reserve in 1830; however, it appears that Indian Agent T.G. Anderson, a devout Anglican, "saw his own role as that of chief missionary."[43]

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[37] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 294, para. 21).

[38] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 293, para. 20); see also Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 70).

[39] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, pp. 69–71, 88–90).

[40] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 306–8, para. 42).

To further complicate the situation, the Potaganasees had already been converted to Roman Catholicism. Although they were served by clergy only sporadically, they were encouraged to follow their faith by the proximity of the Ojibwa-Métis community near Penetanguishene and by a group of Catholic Ottawa Indians under the leadership of Jean-Baptiste Assiginack, who had settled in the area. The Potaganasees were not supported in their beliefs by others on the reserve, however. In September 1830, Superintendent Anderson commented upon the fear of the Potaganasees that they might be forced to abandon their religion, due to the fact that the Reverend Mr Archibald had "frequently expressed his detestation of the Catholicks [sic] in the severest terms."[44]

The religious conflict was often played out in the field of education. In September 1830, Superintendent Anderson informed the Lieutenant Governor that

> Mr. Archbold was originally decidedly opposed to even a school being at the Narrows ... but the moment it was known that Your Excellency had permitted the Methodists to make use of the School House, plans were devised to prevent their occupying it.[45]

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[41] John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984), 85.

[42] John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984), 84.

[43] John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984), 84.

[44] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 299, para. 30).

[45] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 299, para. 30).

Archibald's plan was to undermine the influence of other Christian denominations in the area by competing directly with them and criticizing their methods and sincerity. Unfortunately, neither Archibald nor his assistant could speak the Chippewa language, a deficiency that greatly limited the quality of instruction in their school, and ultimately the Anglican school was closed down.[46]

However, Superintendent Anderson still promoted the Anglican cause over that of the other Christian denominations, on one occasion denying a request from the Methodists for a parcel of land on which to build a mission house.[47] In addition, Chief Aisance subsequently complained to the Lieutenant Governor's representative that Anderson had refused to allow a Roman Catholic priest access to the approximately 100 Catholic Indians on the reserve.[48] As a result, the stage was set for conflict and divisiveness. As one historian commented:

> This bringing together of divergent interests brought to a head a growing religious ferment among the northern Indians. Annual distributions of presents at Penetanguishene became occasions for religious debate, often followed by decisions for a particular form of Christianity. Leading speakers included Anderson, Assiginack, Jones, and later Adam Elliot, agent for the Home District of the Society for Converting and Civilizing the Indians. Assiginack's major prize was John Aisance, Methodist Chief of the Coldwater band, while the Methodists rejoiced over chiefs who suddenly turned in their medicine bundles. Although the debates were conducted with customary Indian politeness, Anderson's obvious support of Anglican claims provoked discord.[49]

Despite the background of religious strife, by the end of 1830, the followers of Chief Aisance had cleared approximately 150 acres of underbrush at Coldwater and had indicated their willingness to settle there.[50] Eventually, Chiefs Yellowhead and Snake agreed to direct several of their young men to settle on farm lots along the Coldwater Road, while they and others with school-age children would remain in the village at the Narrows[51] – a compromise that was evidently satisfactory to both sides.

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[46] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 75).
[47] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 77).
[48] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 334, para. 89).
[49] John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984), 84–85.
[50] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 307, para. 41).
[51] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 297, para. 26).

Throughout 1831, efforts to develop the reserve continued, as land was cleared by the Indians and by departmental employees. A new contractor was engaged that March in the hope that the construction of houses would proceed.[52] Oxen had been purchased, crops were planted, and firm plans were made to construct a sawmill and a gristmill. The department employed three labourers, a blacksmith, a surgeon, a farming instructor, and two schoolteachers to serve the reserve.[53] By early 1831, the government had spent some £3,000 on the implementation of the settlement policy as a whole,[54] and it would not be long before government officials would begin to consider the experiment an expensive one. As a result, officials not only began to cut costs, but also began to devise various means to make the reserve support itself, as a necessary counterpart to the planned reduction of the government's financial investment in the entire enterprise.

In May 1831, Superintendent Anderson suggested that the Indians no longer be paid for making repairs to the road and for clearing land for their houses.[55] Later that year, he proposed reducing the number of staff employed by the government to provide services on the reserve.[56] As well, the government proposed to foster self-sufficiency by involving the Indians on the reserve in a profit-making enterprise to transport settlers along the Coldwater Road. The Chippewas were not interested, however, and this plan never materialized.[57] Another measure intended to foster independence contemplated the use of the Indians' own annuity funds to finance the construction of permanent structures such as the sawmill and the gristmill.[58] The latter was intended to operate at a profit for the benefit of the Bands by grinding grain for settlers in the area.

Over the next few years, growth on the reserve continued, and its development came to be largely financed by the Bands themselves. Progress did not come without problems, however. It had been determined that Mr Lewis, the original contractor hired to construct houses and other buildings on the reserve, had drawn two-thirds of his contractual remuneration from the government while completing only one-quarter of the work.[59] As a result, the contractor hired to complete construction refused to work for the amount remaining in Lewis's original contract and relinquished his position in August 1831.[60] The houses were eventually completed, according to a surveyor's report of March 1833,[61] but Indian annuity funds were utilized to complete the job in place of government funding.[62]

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[52] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 311, para. 48).

[53] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 284, para. 16).

[54] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 317, para. 64).

[55] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 313, para. 53).

[56] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 320, para. 69).

[57] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, pp. 87–88).

[58] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 319, para. 67).

In addition, the increasing encroachment of settlers, particularly near the villages, prompted the Chiefs to consider briefly the relocation of their people to a more remote location. In July 1832, they made a formal request to that effect to Lieutenant Governor Colborne;[63] however, the colonial officials declined to consider it, stating that, no matter where the Indians went, they would be unlikely to escape being surrounded by white settlement forever.[64] Although a number of families from Aisance's Band continued to press for relocation into 1833, it appears that the idea was soon dropped by Chiefs Aisance and Yellowhead, as well as by the Potaganasees.[65]

The renewed commitment of the Bands to the Coldwater-Narrows Reserve may be demonstrated by the consent of Chief Aisance, in 1832, to the requisition of £200 from his Band's share of annuity payments in order to complete the sawmill.[66] In addition, the Chiefs of the Chippewa Bands consented to two requisitions of annuity funds during 1833 to complete the gristmill;[67] however, construction progressed slowly, bringing complaints from the Bands about this and other issues. The blacksmith resident at the reserve had been discharged from government employment, with the result that the Indians were required to pay for his services, but, as the annuity funds were being utilized for construction, the Indians had no means of doing so. Further, the

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[59] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 323, para. 72).

[60] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 323, para. 72).

[61] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 328, para. 85).

[62] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 324, para. 74).

[63] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 352, para. 8).

[64] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 353, para. 10).

[65] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 356, para. 15).

[66] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 425, para. 23).

[67] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 327, para. 82).

Chiefs complained to the Lieutenant Governor's representative that settlers continued to encroach on lands near the reserve, and that, other than what was provided to children at school, band members were denied any produce from the community farms at the two villages.[68] Anderson disputed many of these complaints,[69] and it appears that no significant changes were made. On the positive side, however, the gristmill was finally completed in 1834, at a cost of £1,591.13, all of which had been drawn from Indian annuity funds.[70]

The government initiated another project at the reserve in 1834 – namely, the construction of an inn to house travellers at the Narrows. Built on reserve land, the buildings were to be owned by the farming instructor, Gerald Alley, until the Indians could afford to purchase them.[71] It is not known whether this project ever came to fruition; however, plans went forward to build a second sawmill, to be located at the Narrows.

By September 1835, sufficient progress had been made to prompt Superintendent Anderson to report favourably on the state of the reserve to his superiors. Notwithstanding the religious conflict, Anderson reported that a total of about 500 acres had been cleared and that each Indian family had a small farm under cultivation on which potatoes, corn, wheat, and oats were grown. In addition to subsistence farming, members of the Bands fished in the fall "as a source of profit, and not merely for their own food."[72] He stated that the Indians lived in log or frame houses, were well dressed, and as a general rule were law-abiding and did not abuse alcohol. Schools operated at both villages, and the younger members of the Bands were literate and understood basic arithmetic. He reported that a sawmill and a gristmill were in operation at Coldwater, and that another sawmill was under construction at the Narrows. He was optimistic about the future of the reserve and its residents, and stated that the settlement experiment, on the whole, had been a successful one.

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[68] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 333, para. 89).

[69] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 334–37, para. 90).

[70] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 341, para. 107). In all, a study of the extant financial records reveals that the reserve was financed both by Crown funds and by annuities belonging to the Chippewas of Lakes Huron and Simcoe, with slightly more than half of the total cost of development attributable to Crown funds. See Joan Holmes and Associates, "Sale of Coldwater Tract Lands and Disposition of Land Sales Proceeds," 1998, 12.

[71] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 340, para. 102).

[72] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 343–44, para. 111).

Despite this optimism, however, events were under way that would ultimately precipitate the demise of the settlement. The British authorities would soon make changes at the highest level of the colonial bureaucracy that would profoundly affect the Chippewas. As a result of the change in personnel, the official Indian policy would change. Little more than a year later, the reserve would be surrendered, making irrelevant all the progress that had been achieved there.

THE BANDS' REQUEST FOR SELF-GOVERNMENT AND SECURE TITLE TO THE RESERVE

Despite the fact that the Chiefs of the Coldwater-Narrows Reserve had briefly considered the relocation of their people to a more remote locale in Upper Canada, it appears that their commitment to the reserve ultimately overcame their doubts about its suitability.

As early as 1831, the Reverend Peter Jones, who was himself a Chief of the Mississaugas of the River Credit, had written to the British Secretary of State for the Colonies on behalf of the Indians of Upper Canada, including the tribes of Lake Simcoe and Matchedash. He wrote:

> I wish also to say something about our lands. My Indian brethren feel much in their hearts on this subject. We see that the country is getting full of white people, and that the hunting will soon be destroyed ... It is our desire that whatever lands may be marked out for us, to keep the right and title ourselves, and not be permitted to sell them, not to let any white man live on them unless he is recommended by our council, and gets a license from our father the governor.[73]

The letter was forwarded by the British authorities to Lieutenant Governor Colborne for comment. Although Colborne felt that the tribes of Upper Canada were not yet sufficiently advanced in British colonial ways to be granted individual deeds for their lands, he affirmed in the strongest terms that the lands set apart for them should be safeguarded by the government "for the benefit of the Indians and their posterity."[74]

A little more than a year later, in response to the desire of a few members of Aisance's Band to relocate, the Superintendent General of Indian Affairs instructed Anderson to advise the discontented members that documents could be issued "[s]ecure[ing] the Lots assigned by Government, for them in their Own possession,"[75] as a means of encouraging them to stay at Coldwater. It is not clear whether this plan was ever carried out, but it appears that the Chiefs were made aware of the offer and wished to have it extended to the entire community. In September 1833, Chiefs Yellowhead, Aisance, and Taugaiwinene (of the Potaganasees) met in council with the Lieutenant Governor's representative, Major Winniett. At this meeting, Chief Yellowhead stated:

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[73] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 366, para. 1).

[74] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 367, para. 3).

> Our Father [Lieutenant Governor] likewise promised on your return from Coldwater to have two Deeds made out for our Lands one to made out [sic] on Parchment and the other on Common paper to be lodged in our hands before the Cold weather begins.[76]

At the same meeting, Chief Aisance reaffirmed the commitment of his people to the Coldwater-Narrows Reserve:

> Father, you saw on the road our houses and our Lands I do not wish to abandon them I wish to improve them. Father if you give us what you have promised us our young Men will be very glad and will work hard.[77]

As development on the reserve continued, the Bands petitioned the government for greater control over their lands. In November 1834, Superintendent Anderson wrote to the Superintendent General of Indian Affairs, advising him that the Indians wished to have their land laid out into 50-acre lots, at their own expense.[78] A few months later, in January 1835, four Chippewa Chiefs of the reserve petitioned the government to allow the Bands to manage all operations on the Coldwater-Narrows Reserve, including the schools, gristmill, sawmills, and agricultural enterprises.[79] It is not known whether they received any response to this request.

In the meantime, however, because of the encroachment of settlement and the consequent loss of game and fish, many of the Chippewa Chiefs from the surrounding region decided to explore the feasibility of having all of their nations move to one large settlement. In January 1836, Chief Yellowhead convened a council at the Narrows to consider this idea, as well as "to devise measures to prevent the ruin and degradation of our descendants."[80] At this meeting, which was attended by the Chiefs of Coldwater-Narrows, the River Credit, Rice Lake, Grape Island, Balsam Lake, Saugeen, and French River, it was apparently asserted by the Chiefs that, should a removal to one settlement be recommended by the government, the only acceptable tract was the Indian territory at Saugeen. Whether this can be interpreted as evincing an intention to give up existing settlements is in doubt, however, as the Council also formally petitioned the Lieutenant Governor at the end of the meeting requesting that title to their lands be secured "in such a way as to secure the property to ourselves and to our Children forever."[81]

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[75] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 369, para. 7).

[76] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 370, para. 8).

[77] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 371, para. 8).

[78] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 374, para. 10).

[79] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 374, para. 11).

In any event, on August 19, 1836, another petition requesting self-management and greater security of tenure was forwarded by the Chippewas of Coldwater and the Narrows to the new Lieutenant Governor, Francis Bond Head. In the latter document, the Chiefs specified their wishes:

> [T]hat the Lands along each side of the Coldwater road from the extremity of the Mill and Establishment reservation to halfway to the Narrows should be granted to them by 50 acre Lots one to each Individual, heads of family, or young men of our tribes, reserving however for the benefit of our community the Lands now belonging to the Mills and Establishment reserve ...[82]

On behalf of the Lieutenant Governor, the Superintendent General of Indian Affairs informed Anderson on October 6 that, although the request for the subdivision of land was denied, the government was inclined to grant the request for self-management:

> With respect to the first subject of the Petition H[is] E[xcellency] being of opinion that as the Petitioners express themselves dissatisfied with the present managmt. of their Mills, Schoolhouse, Farmhouses and Cattle, and imagine they can place the Establishment under a more advantageous arrangement, they ought in principle to be permitted to manage their own affairs in their own way, and you will be pleased,

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[80] Joan Holmes and Associates, "Coldwater-Narrows Surrender of 1836: Report about Additional Research Findings," October 2000 (p. 3, doc. 3).

[81] Joan Holmes and Associates, "Coldwater-Narrows Surrender of 1836: Report about Additional Research Findings," October 2000 (p. 4, doc. 4).

[82] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 376, para. 13).

> therefore, to acquaint the Petitioners that the L[ieutenant] G[overnor] accedes to this part of the prayer of their petition.[83]

From all of the above, it appears that the Chippewas were taking steps to secure their ownership of the reserve, likely in response to the increasing pressure exerted by the flow of settlers into the region. Steam transportation had operated on Lake Simcoe since 1833 and, together with the steamer service operating daily between Coldwater and Penetanguishene, it facilitated the constant migration into the northwestern regions of Upper Canada. In addition, the sawmills and gristmill served as another inducement to settlers.[84] The Coldwater-Narrows Reserve lay at the heart of this activity, likely prompting some settlers to hope that they would eventually be able to acquire its cultivated and productive farmland.[85]

The pressure exerted by settlers would not be the most significant circumstance determining the future of the reserve, however. The event that would prove to be the most critical in that respect was the appointment, in early 1836, of Sir Francis Bond Head as Lieutenant Governor of Upper Canada.

SURRENDER OF THE COLDWATER-NARROWS RESERVE

The retirement of Lieutenant Governor Colborne in 1836, and his replacement by Sir Francis Bond Head, would have profound effects upon the Indian population of Upper Canada, including the Chippewas of the Coldwater-Narrows Reserve. Unlike Colborne, who had continued and expanded an Indian settlement policy that had led to the creation of the Coldwater Reserve, the new Lieutenant Governor did not believe that Indians should reside near white settlers. His motives may be gleaned from comments made in a letter he forwarded to Lord Glenelg, Secretary of State for the Colonies, soon after his arrival in Upper Canada:

> [I]t was evident to me that we should reap a very great Benefit, if we could persuade those Indians, who are now impeding the Progress of Civilization in Upper Canada, to resort to a place possessing the double Advantage of being admirably adapted to *them* (inasmuch as it affords Fishing, Hunting, Bird-Shooting, and Fruit), and yet in no Way adapted to the White population.

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[83] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 577, para. 14).

[84] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, pp. 114–15).

[85] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 114).

> I feel confident that the Indians, when settled by us in the Manner I have detailed, will be better off than they were; that the Position they will occupy can bona fide be fortified against the Encroachments of the Whites; while, on the other hand, there can be no doubt that the Acquisition of their vast and fertile Territory will be hailed with Joy by the whole Province.[86]

The lands to which the Lieutenant Governor proposed to relocate the Indians included the Manitoulin Islands and the Saugeen tract (on the Bruce Peninsula), which had been surrendered during the summer of 1836 at a meeting over which he had presided. On his journey to Manitoulin Island to obtain the above surrenders, Bond Head had passed through the Coldwater-Narrows Reserve and had met Chief Yellowhead at the Narrows. There exists no contemporary account of what was discussed at this meeting, nor any indication who else was present. As noted above, however, the Bands had petitioned Bond Head on August 19 of that year for the right of self-management and the subdivision of their reserve into lots, "reserving however for the benefit of our community the Lands now belonging to the Mills and Establishment reserve."[87] The latter appears to be the only existing document dealing in a substantive way with the future of the reserve made during the specific time frame of the above meeting.

In October 1836, the Chief Superintendent of Indian Affairs, James Givens, wrote to Yellowhead, informing the Chief that the Lieutenant Governor wanted to know "whether you are ready to give him an answer to the matter he spoke to you about when at the Narrows."[88] The "matter" in question was not described, nor was it specifically referred to in a letter Givens sent to Superintendent Anderson later that month, informing him that the Bands at Coldwater-Narrows Reserve would be granted the right to manage their affairs effective March 31, 1837.[89] Chief Yellowhead replied to Givens's letter on November 6, 1836, stating that "as soon as I get an answer from the other Indians I have been consulting on the subject I will immediately proceed to Toronto accompanied by three of my Indians and give an answer on the subject."[90] Givens advised the Chief to wait until the Lieutenant Governor requested him to make the trip, "as it will be necessary for him at the same time he sees you to have an interview with the other Chiefs."[91]

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[86] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 380–81, para. 1).

[87] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 376, para. 13).

[88] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 382, para. 3).

[89] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 382, para. 5).

[90] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 382, para. 6).

On November 26, 1836, Chiefs Yellowhead and Aisance, together with 10 principal men of their Bands and representatives of the Snake Band, signed the Coldwater Treaty in Toronto. It was witnessed by Chief Superintendent Givens, among others, but Superintendent Anderson, the agent resident on the reserve itself, does not appear to have been present. The document stated that the Indians of the Coldwater-Narrows Reserve agreed to surrender the reserve for sale, in exchange for the annual interest on one-third of the proceeds of sale. The remaining two-thirds of the proceeds was to be applied to other purposes unrelated to the Chippewas of Coldwater and the Narrows. One-third was to be applied for the "general use of the Indian Tribes of the said Province," and the remainder was to be applied "to any purpose (but not for the benefit of the said Indians) as the Lieutenant Governor may think proper to direct."[92]

A year later, in response to a petition from religious leaders expressing the dissatisfaction felt by the Indians of Upper Canada as a result of recent land surrenders, Bond Head provided a brief description of what had occurred at his meeting with the Bands at the Coldwater-Narrows Reserve the previous summer:

> In the course of the inspectional Tour which I last Year made of the Province, I assembled, in the Months of August and September, the Indians, at each of these Places, and after explaining to them how much better, in my Opinion, it would be for them to receive Money for their Hunting Ground than to continue on it, surrounded as it was by the White Population, and consequently deprived as it was of its Game, I left them to reflect by themselves on what I had stated.
>
> The Chiefs of the Narrows and of Coldwater, after a long debate, became unanimously of Opinion, that the Offer I had made to their Tribes was advantageous. They accordingly, on the 26th of November, came down in a Body to Toronto to beg me to carry it into effect.[93]

The only other account of what occurred at the August 1836 meeting is found in a letter written by Chief Yellowhead to Chief Superintendent Jarvis in November 1840. In contrast to Bond Head's recollections, Yellowhead wrote:

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[91] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 383, para. 7).

[92] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 384, para. 9).

[93] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 398, para. 39).

"Sir francis [sic] Bond Head came when we lived on Orillia drove us out of it to go and live on some of the island [sic] and so we did."[94] As for the signing of the surrender document, Yellowhead's letter indicated that the Indians who travelled to Toronto in November 1836 had deliberated for two days before making a decision:

> And it was tow [sic] days before we could give him answer at last we gave up the land so he gave us writing for it we to get pay for our land and now we wish you to consider about this.[95]

Further, the actions of the Indians subsequent to the signing of the surrender indicated confusion concerning the effect of the document that they had executed. On the one hand, Superintendent Anderson wrote in December 1836 that, after the Indians informed him of what had transpired in Toronto, they proceeded to sell their personal property, but were "in a quandary quite undecided where to take up their future residence."[96] On the other hand, in February 1837, Chief Aisance and his Band unilaterally took possession of the Coldwater gristmill, to the chagrin of departmental officials, who threatened to cancel the Indians' previously granted right of self-management set to take effect at the end of March.[97] According to Anderson, Chief Aisance not only refused to comply with Givens's order to desist, but fully expected that

> the establishment at this place and the Narrows will be given up to them on the 31st March inst. This, they desire me to say, has been promised to them by His Excellency and as I have no specific orders on the subject I will thank You for instructions.[98]

On March 31, 1837, Givens sent a message to the Chiefs advising them that Anderson would be instructed to give them all of the property belonging to the Bands, for them to manage as they saw fit.[99] To that end, Anderson was instructed on the same day to deliver to the Chiefs "all the property real and personal of every description belonging to the Tribe."[100] On April 8, Anderson reported that the transfer of property had taken place.[101]

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[94] Joan Holmes and Associates, "Coldwater-Narrows Surrender of 1836: Report about Additional Research Findings," October 2000 (p. 5, doc. 16).

[95] Joan Holmes and Associates, "Coldwater-Narrows Surrender of 1836: Report about Additional Research Findings," October 2000 (p. 9, doc. 16).

[96] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 385, para. 12).

[97] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 377, para. 15).

[98] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 1485, para. 19).

[99] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 391, para. 28).

The Indians were not the only ones expressing dissatisfaction with their situation. Beginning in April 1837, other parties began to petition government officials to register their concerns over the actions of Sir Francis Bond Head. The first of these petitions, dated April 10, 1837, was made by a group of Methodist missionaries. They protested the displacement of an unnamed group of Methodist Indians who had cultivated and built homes and barns on their land, only to be required to move as the result of a surrender. The missionaries wrote that "justice and humanity unequivocally demand[ed]" that the Indians be allowed to stay.[102] A few months later, another petition was sent to Sir Francis Bond Head by the "Resident and Ministers of the Wesleyan Methodist Church in Canada," stating that the Indians were extremely dissatisfied as a result of being asked to surrender lands on which they had made improvements. The petition stated that the improvements had been made in the belief that those lands would belong to them and their children forever.[103] As well, the Aborigines Protection Society, a humanitarian organization based in England, petitioned the Governor General of Canada, protesting Lieutenant Governor Bond Head's policy of obtaining wholesale surrenders of fertile and developed reserves. According to the petitioners, the policy caused the Indians "to be banished to the 23,000 rocks of granite, dignified by the name of Manitoulin Island," which were "perfectly useless as Sir Francis admits, for every purpose of civilized life."[104]

Sir Francis Bond Head was replaced in 1838, but the surrender of the Coldwater-Narrows Reserve was allowed to stand, and the Chippewas began to leave their homes. In June 1838, the recently appointed Chief Superintendent of Indian Affairs, S.P. Jarvis, wrote to the new Lieutenant Governor, George Arthur, to discuss the removal of the Bands from Coldwater-Narrows Reserve. Jarvis reported that the majority of the Indians did not want to go to Manitoulin Island, but instead wished to settle as near as possible to the old villages of Coldwater and the Narrows.[105] As a result, Chief Yellowhead and his followers proposed that approximately 1,000 acres of land on the east side of Lake Simcoe in the Township of Rama be purchased for them. The purchase was authorized by Order in Council in August 1838,[106] and the necessary funds were taken from the annuity account of the Chippewa Tri-Council.[107]

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[100] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 392, para. 29).

[101] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 392, para. 31).

[102] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 393, para. 32).

[103] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 393–94, para. 35).

[104] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, pp. 400–4, para. 43).

Some members of Chief Aisance's Band moved to Beausoleil Island in Georgian Bay,[108] but Aisance himself apparently wished to settle at the mouth of the Severn.[109] Chief Snake's Band moved back to Snake Island in Lake Simcoe, to the farms they had established before moving to the Narrows; a few others moved to the Saugeen tract and to Manitoulin Island.[110]

On May 26, 1842, a petition concerning the terms of the surrender of the reserve was signed by the Chiefs of the Rama, Snake Island, and Coldwater Indians and forwarded to the Governor General of Canada. The petition stated:

> We wish to state to your Excellency that when Sir F. Bond Head insisted on our selling this Land and the bargain he had previously drawn out for us to sign, we were not made sensible of the full purport, so that we knew not the nature of the bargain. It may be proper for us to state to your Excellency ... that up to the present period we have not received any money from the sale of the said Land ... We are not fully satisfied that other people should participate in the money arrising [sic] from this sale – We conceive it to be our right to reap the benefit and not others. Also, the article of agreement is not satisfactory as it does not specify what the principal of the money comes to.... In writing to your Excellency we wish to state particularly that the Grist Mill at Coldwater, and the Saw Mill near the Coldwater Road are not included in the Agreement and hence we shall continue to consider them as Indian property.[111]

In the following year, Chief Superintendent Jarvis was directed by the Governor General to make a payment out of funds designated for the general benefit of the Indians. Jarvis replied that, although Bond Head intended to create such an account out of funds derived from the Coldwater-Narrows surrender, no such account existed. Further, Jarvis informed his superior that the Chippewas had not understood what they had signed in this respect:

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[105] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 405, para. 44).

[106] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 405, para. 45).

[107] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 406, para. 47).

[108] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 185).

[109] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 405, para. 45).

[110] Cynthia C. Wesley-Esquimaux, "The Coldwater Narrows Reservation," 1991 (ICC Documents, p. 185).

[111] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 411, para. 55).

> When the Wyandotts, of Amherstburg and the Chippewas of Lakes Huron and Simcoe, surrendered a portion of their reserves to the Crown to be sold for their benefit at the suggestion of Sir Francis B. Head, they consented that a portion of these Reserves should be appropriated for the general benefit of the Indian Tribes, but when they fully understood what they had consented to, both Tribes sent remonstrances to Sir George Arthur and requested that the whole proceeds of the sales might be appropriated for the benefit of the respective Tribes who had executed the surrenders and Sir George Arthur verbally in my presence informed the Indians that he thought their request reasonable and should be complied with.[112]

SALE OF THE COLDWATER-NARROWS RESERVE

On June 18, 1840, an Order in Council was passed approving the sale of the Coldwater-Narrows Reserve to settlers at the rate of eight shillings per acre.[113] However, on September 23, 1844, an "Inspection and Valuation of the Town Plot of Orillia [The Narrows] and the Indian Reserve between Coldwater and Orillia" was completed. This valuation set an average price of £7 12s, or approximately $30.47, for the lots in the town of Orillia, and an average per acre price for the land on the road between Orillia and Coldwater of 10s 6d, or about $2.10.[114] This valuation was approved by Order in Council dated December 30, 1844.[115]

The town plot contained 310 regular shaped lots, each comprising one-half acre, for a total of 155 acres. In addition, there were a number of irregular waterfront lots estimated to contain about 31 acres, for an approximate total of 186 acres. Most of the farm lots were sold as regular 200-acre lots, although some had been subdivided and sold as 100-acre lots. The total acreage of the farm lots was estimated to comprise some 8,505 acres. The road allowances were not sold or patented.[116]

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[112] Joan Holmes and Associates, "Coldwater-Narrows Surrender of 1836: Report about Additional Research Findings," October 2000 (p. 12, doc. 17).

[113] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 408, para. 52).

[114] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 411, para. 57).

[115] Joan Holmes and Associates, "The Coldwater Treaty: Draft Historical Report," 1993 (ICC Documents, p. 412, para. 58).

[116] Joan Holmes and Associates, "Sale of Coldwater Tract Lands and Disposition of Land Sales Proceeds," 1998, p. 6.

Although overall data is incomplete, from a study of the land sales, it appears that all but 14 per cent of the town lots and all of the farm lots were sold at or above their appraised value.[117] The exception to this was the Market Square of Orillia, which was sold to the municipality for a price below the average price for lots in that area.

The land sales took place between 1838 and 1872, with the bulk of activity occurring in the 1840s and 1850s. The total land purchase proceeds collected amounted to $28,855.06, representing principal and interest on instalments.[118] A small amount (approximately $156) was collected for improvements.

Because of the lack of complete records, it is not possible to determine whether all the money collected on account of land sales was deposited to the credit of the Chippewas of Lakes Huron and Simcoe. Money was held in several accounts that have records spanning different periods of time. These accounts were established for the "Chippewas of Lakes Huron and Simcoe" in common, as the three Bands did not have separate trust accounts until the 1860s. A 5 per cent commission was credited to the above accounts.[119]

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[117] Joan Holmes and Associates, "Sale of Coldwater Tract Lands and Disposition of Land Sales Proceeds," 1998, p. 7. These percentages are based on sales for which complete data exist.

[118] Joan Holmes and Associates, "Sale of Coldwater Tract Lands and Disposition of Land Sales Proceeds," 1998, p. 8.

[119] Joan Holmes and Associates, "Sale of Coldwater Tract Lands and Disposition of Land Sales Proceeds," 1998, p. 13.

PART III

ISSUES

This claim concerned the surrender, by treaty dated November 26, 1836, of a 14-mile tract of land between the Narrows at Lakes Couchiching and Simcoe in the east and Matchedash Bay in the west. The following is a more detailed summary of the issues as they were developed by the parties throughout the planning conferences:

1 Was there a surrender of the Coldwater-Narrows Reservation on November 26, 1836?

   a) Was there a public meeting of the Chippewa Tri-Council consistent with the instructions in the Royal Proclamation of 1763?
   b) Did the Chippewa Tri-Council otherwise express its consent to a surrender of the Reservation?
   c) Did the Chippewa Tri-Council Chiefs have the authority to surrender the Reservation in the absence of such a public meeting or consent?

2 Did the Coldwater Treaty of November 26, 1836, reflect the intentions of the Chippewa Tri-Council?

   a) If not, is the surrender invalid?
   b) If not, did the Crown breach a fiduciary duty or commit an equitable fraud in accepting the surrender?

3 Did the Coldwater Treaty of November 26, 1836, represent a surrender that was improvident or exploitative?

   a) Was the provision for payment of interest on sale proceeds improvident or exploitative?
   b) Was the lack of explicit provisions for relocation of the Chippewa Tri-Council improvident or exploitative?
   c) If so, did the Crown have a duty to refuse the surrender?

d) If so, did the Crown breach a fiduciary duty or commit an equitable fraud in accepting the surrender?

4 Did the Coldwater Treaty of November 26, 1836, require the relocation of the Chippewa Tri-Council to lands of their choosing within a reasonable time?

a) If so, was this obligation fulfilled?
b) If not, did the Crown have a fiduciary duty in any event to ensure the satisfactory relocation of the Chippewa Tri-Council?

5 Did the Coldwater Treaty of November 26, 1836, require the Crown to sell the land and improvements in a timely fashion and for fair value?

a) If so, was this obligation fulfilled?
b) Were lands sold in a timely fashion?
c) Were the lands sold for fair market value?
d) Were the improvements sold for fair market value, having regard to the investment of Chippewa annuities in the improvements?
e) Were the expenses charged against the sale proceeds reasonably and properly related to the sales?

6 Whether or not there was a surrender of the Coldwater-Narrows Reservation on November 26, 1836, did the Crown breach its fiduciary duties to the Chippewa Tri-Council while taking or purporting to take the surrender?

PART IV

CONCLUSION

On July 23, 2002, Robert D. Nault, Minister of the Department of Indian Affairs and Northern Development, informed all the Chiefs of the Chippewa Tri-Council that Canada was willing to accept for negotiation the specific claim known as the Coldwater-Narrows Reservation surrender. The letters to the Chiefs of the Chippewa Tri-Council form Appendix B to this report.

In light of Canada's offer to accept the claim for negotiation under the Specific Claims Policy, the Commission has suspended its inquiry and wishes the parties well in their negotiations towards a settlement.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine
Daniel Bellegarde
Renée Dupuis

Roger J. Augustine
Commissioner

Daniel J. Bellegarde
Commissioner

Renée Dupuis
Commissioner

Dated this 12th day of March, 2003.

APPENDIX A

CHIPPEWA TRI-COUNCIL INQUIRY COLDWATER-NARROWS RESERVATION SURRENDER CLAIM

1 Planning conferences

The Commission held eight planning conferences:

November 4, 1996
December 10, 1996
December 15, 1997
August 7, 1998
November 12, 1998
October 5, 2001
February 25, 2002
March 18, 2002

2 Content of formal record

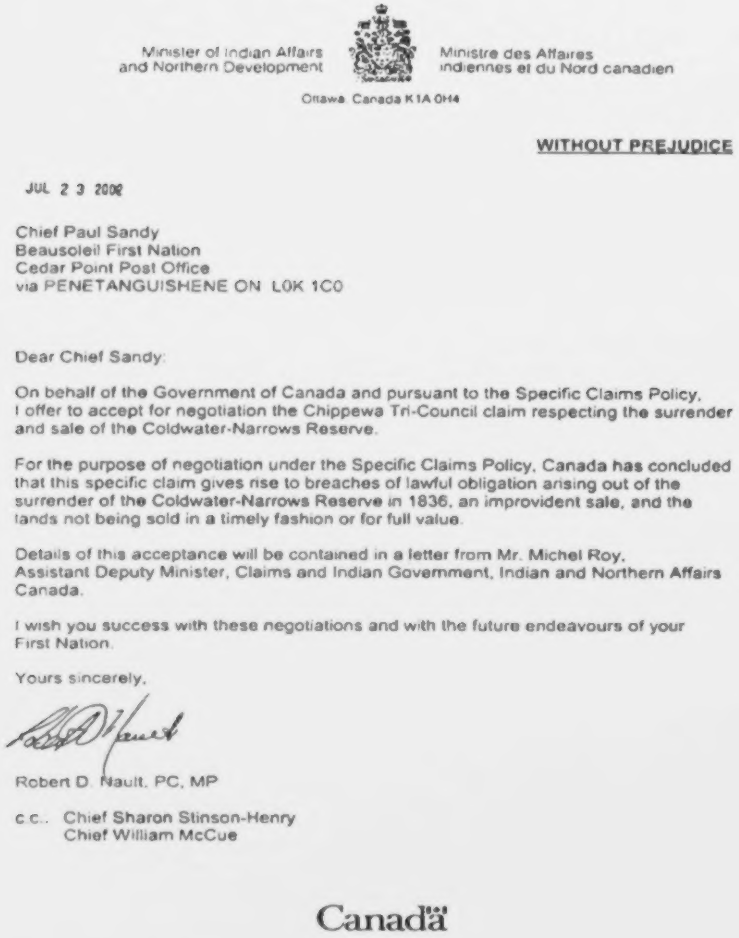
The following record for the Chippewa Tri-Council Inquiry – Coldwater-Narrows Reservation Surrender Claim consists of the following materials:

- the documentary record (9 volumes of documents)
- Draft report on Coldwater Expenditures, prepared by Joan Holmes and Associates, May 1998
- Draft report, "Sale of Coldwater Tract Lands and Disposition of Land Sales Proceeds," prepared by Joan Holmes and Associates for Specific Claims, DIAND, ICC, and Chippewa Tri-Council, October 1998
- Report, "Coldwater-Narrows Surrender of 1836: Report about Additional Research Findings," prepared by Joan Holmes and Associates, October 2000

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

WITHOUT PREJUDICE

JUL 2 3 2002

Chief Paul Sandy
Beausoleil First Nation
Cedar Point Post Office
via PENETANGUISHENE ON L0K 1C0

Dear Chief Sandy:

On behalf of the Government of Canada and pursuant to the Specific Claims Policy, I offer to accept for negotiation the Chippewa Tri-Council claim respecting the surrender and sale of the Coldwater-Narrows Reserve.

For the purpose of negotiation under the Specific Claims Policy, Canada has concluded that this specific claim gives rise to breaches of lawful obligation arising out of the surrender of the Coldwater-Narrows Reserve in 1836, an improvident sale, and the lands not being sold in a timely fashion or for full value.

Details of this acceptance will be contained in a letter from Mr. Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada.

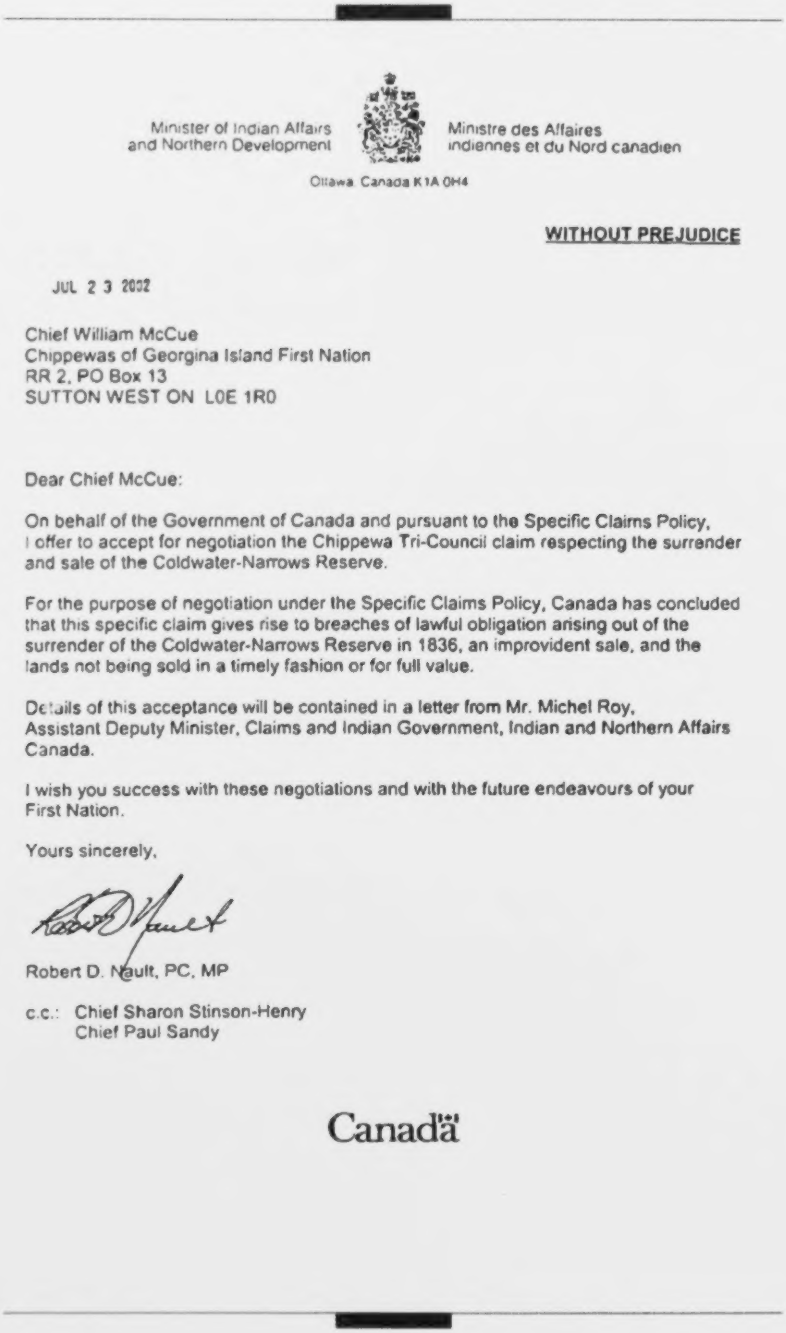
I wish you success with these negotiations and with the future endeavours of your First Nation.

Yours sincerely,

Robert D. Nault, PC, MP

c.c.: Chief Sharon Stinson-Henry
Chief William McCue

Canada



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

WITHOUT PREJUDICE

JUL 23 2002

Chief William McCue
Chippewas of Georgina Island First Nation
RR 2, PO Box 13
SUTTON WEST ON L0E 1R0

Dear Chief McCue:

On behalf of the Government of Canada and pursuant to the Specific Claims Policy, I offer to accept for negotiation the Chippewa Tri-Council claim respecting the surrender and sale of the Coldwater-Narrows Reserve.

For the purpose of negotiation under the Specific Claims Policy, Canada has concluded that this specific claim gives rise to breaches of lawful obligation arising out of the surrender of the Coldwater-Narrows Reserve in 1836, an improvident sale, and the lands not being sold in a timely fashion or for full value.

Details of this acceptance will be contained in a letter from Mr. Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada.

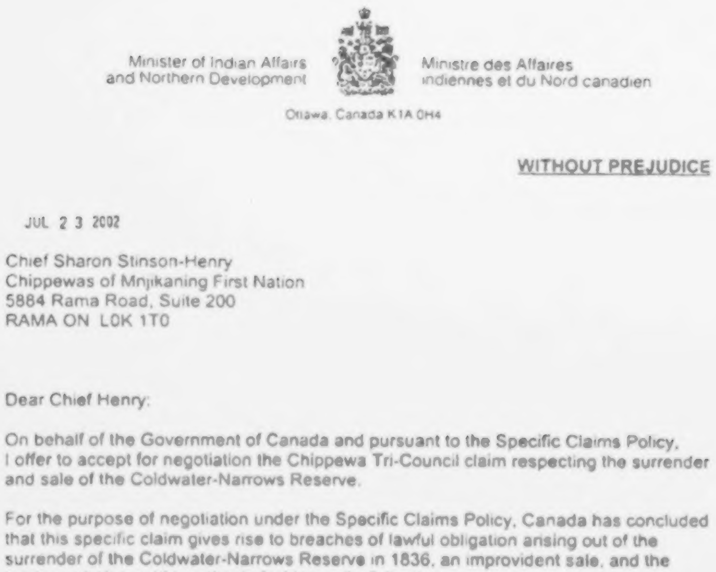
I wish you success with these negotiations and with the future endeavours of your First Nation.

Yours sincerely,

Robert D. Nault, PC, MP

c.c.: Chief Sharon Stinson-Henry
Chief Paul Sandy

Canada



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

WITHOUT PREJUDICE

JUL 23 2002

Chief Sharon Stinson-Henry
Chippewas of Mnjikaning First Nation
5884 Rama Road, Suite 200
RAMA ON L0K 1T0

Dear Chief Henry:

On behalf of the Government of Canada and pursuant to the Specific Claims Policy, I offer to accept for negotiation the Chippewa Tri-Council claim respecting the surrender and sale of the Coldwater-Narrows Reserve.

For the purpose of negotiation under the Specific Claims Policy, Canada has concluded that this specific claim gives rise to breaches of lawful obligation arising out of the surrender of the Coldwater-Narrows Reserve in 1836, an improvident sale, and the lands not being sold in a timely fashion or for full value.

Details of this acceptance will be contained in a letter from Mr. Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada.

I wish you success with these negotiations and with the future endeavours of your First Nation.

Yours sincerely,

Robert D. Nault, PC, MP

c.c.: Chief William McCue
Chief Paul Sandy

Canada

INDIAN CLAIMS COMMISSION

MISSISSAUGAS OF THE NEW CREDIT FIRST NATION INQUIRY
TORONTO PURCHASE CLAIM

PANEL

Commissioner Daniel J. Bellegarde

COUNSEL

For the Mississaugas of the New Credit First Nation
Kim A. Fullerton

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Kathleen N. Lickers

JUNE 2003

CONTENTS

PART I ***INTRODUCTION*** 231
Mandate of the Indian Claims Commission 234

PART II ***HISTORICAL BACKGROUND*** 236
Background to the First Nation's Claim 236
Settlement of the Mississaugas on the North Shore of Lake Ontario 238
Surrender of the "Carrying Place" and Toronto Purchase, 1787 242
  Map 1 243
Formalizing the Toronto Purchase, 1805 251

PART III ***ISSUES*** 259

PART IV ***CONCLUSION*** 260

APPENDICES

A Mississaugas of the New Credit First Nation Inquiry – Toronto Purchase Claim 261
B Government of Canada's Offer to Accept Claim 262

PART I

INTRODUCTION

In June 1986, the Mississauga Tribal Claims Council submitted a number of claims, including the Toronto Purchase claim, to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND).[1] The claims were submitted on behalf of five First Nations, one of which was the Mississaugas of the New Credit. The claim in respect of the Toronto Purchase alleged that a vast expanse of land in southern Ontario, which includes Metropolitan Toronto, had never been properly surrendered to the Crown. It also alleged that the transactions concerning the purchase, which took place in 1787 and 1805, were tainted by breaches of the fiduciary duty owed by the Crown to the Mississauga Nation.

On June 15, 1993, Christine Cram, Director of Specific Claims East, wrote to the Chiefs of the five First Nations, advising them of the federal government's preliminary position on the claims. She advised that the claims, including the Toronto Purchase claim, did not fall within the scope of the Specific Claims Policy and, as a result, must be rejected.[2]

In May 1994, the Mississaugas of the New Credit First Nation forwarded a Band Council Resolution (BCR) to the Indian Claims Commission, requesting that the Commission review the Toronto Purchase claim.[3] Subsequently, Commission employees held discussions with representatives of all five First Nations to determine whether the Toronto Purchase claim, as well as the other claims, fell within the Commission's mandate. A number of preliminary planning conferences were held, and, ultimately, the Commissioners decided to conduct an inquiry into the Toronto Purchase claim.[4]

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[1] Union of Ontario Indians, "Mississauga Tribal Claims Council, Claim to Toronto Purchase Lands in Southern Ontario Summary of Claim," June 10, 1986 (ICC Exhibit 2).

[2] Christine Cram, Specific Claims East, to Chief Maurice LaForme et al., June 15, 1993 (ICC Exhibit 5a).

[3] Deborah Ngahuka, Executive Assistant, Mississaugas of the New Credit First Nation, to Kim Fullerton, Commission Counsel, Indian Claims Commission (ICC), May 10, 1994, enclosing Band Council Resolution 1994/1995 - 085 (ICC file 2105-15-4, vol. 1).

[4] Daniel Bellegarde and James Prentice, Co-Chairs, ICC, to Chief Larry Sault, Mississaugas of the New Credit First Nation, September 25, 1995 (ICC file 2105-15-4, vol. 2).

However, for a number of reasons, the First Nations were not prepared to proceed with the claims at that time, and they were put into abeyance in early 1996.

On March 10, 1998, Chief Carolyn King of the Mississaugas of the New Credit First Nation wrote to the Indian Claims Commission requesting that the Commission conduct an inquiry into the rejection of the Toronto Purchase claim as against the New Credit First Nation individually, even though the claim had originally been submitted by a group of First Nations.[5] On May 6, the Commission informed the Specific Claims Branch and DIAND Legal Services of this development and asked for their participation in a planning conference.[6]

The first planning conference was held on July 16, 1998, and it led to the parties' agreeing to clarify the issues and their respective positions.[7] Subsequently, Kim Fullerton, counsel for the First Nation, wrote to Perry Robinson, counsel for Canada, proposing that Canada agree to allow the Toronto Purchase claim to proceed on its own. He also set out the First Nation's position, which included two bases upon which a lawful obligation could be found. The first was that the original 1787 purchase transaction was invalid. The second was that the circumstances leading up to the execution of the 1805 treaty amounted to a breach of the fiduciary duty owed to the ancestors of the plaintiffs. With respect to these circumstances, the First Nation alleged that (1) the Crown had never disclosed to the First Nation that the 1787 transaction was invalid; (2) the Crown had failed to disclose that the 1805 treaty covered a much greater area than the 1787 purchase; and (3) the Mississaugas had no idea that the Toronto Islands were to be part of the purchase.[8]

Three subsequent planning conferences, held on October 1, 1998, November 25, 1998, and February 8, 1999, dealt with many technical issues, such as the clarification of evidence and the production of relevant maps. A more significant issue, however, was Canada's concern that the claim, as originally framed, did not fall within the Commission's Specific Claims mandate. As a result, counsel for the First Nation agreed to draft a new legal submission, in order to frame clearly the legal basis of the claim within the scope of the Specific Claims mandate.

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[5] Chief Carolyn King, Mississaugas of the New Credit First Nation, to Daniel Bellegarde and James Prentice, ICC, March 10, 1998 (ICC file 2105-7-2, vol. 1).

[6] Ron S. Maurice, Commission Counsel, ICC, to Michel Roy, Director General, Specific Claims Branch, and W. Elliott, Senior General Counsel, DIAND Legal Services, May 6, 1998 (ICC file 2105-7-2, vol. 1).

[7] ICC, Planning Conference Summary, July 16, 1998 (ICC file 2105-7-2, vol. 1).

[8] Kim Fullerton, Legal Counsel for the Mississaugas of the New Credit First Nation, to Perry Robinson, Counsel, DIAND Legal Services, September 28, 1998 (ICC file 2105-7-2, vol. 1).

On March 8, 1999, counsel for the First Nation forwarded a new legal submission to counsel for Canada. Although the legal issues did not differ substantially from the September 28 submission, the new submission related the applicable law to the factual allegations in greater detail than had the earlier submission. As well, the new document reiterated that, for the purpose of the inquiry, the First Nation was prepared to recognize that the 1805 purchase was a valid treaty. More importantly, however, it confirmed that the First Nation did not take the position that the Toronto Islands were excluded from the purchase, which was what had given rise to Canada's concern that the claim fell outside of the Specific Claims mandate.[9]

As a result of the new legal submission, Canada agreed to review the claim on its merits, in accordance with the issues set out in the March 8, 1999, legal submission.[10] As a consequence, planning conferences that dealt with technical issues, such as exhibits and maps, as well as the progress of the new legal opinion, took place on April 13 and June 10, 1999.[11] Planning conferences on July 27 and September 14, 1999, examined the issue of additional beneficiaries, as well as the need for new research.[12] In addition, planning conferences on October 19 and December 20, 1999, finalized any remaining undertakings and points of agreement between the parties.[13] In the meantime, the parties waited for Canada to complete its review of the claim.

Over the next six months, the parties received several updates on the status of the claim by conference call. There were no further developments, however, until the Minister of Indian Affairs notified Chief Bryan LaForme on July 23, 2002, that Canada was willing to accept the claim in part.[14] On the same day, Mr Michel Roy, Assistant Deputy Minister, Claims and Indian Government, wrote to Chief LaForme outlining the basis on which Canada was willing to negotiate. In summary, Canada took the position that it would negotiate under the Specific Claims Policy on the basis that the 1805 surrender amounted to a non-fulfillment of a treaty or agreement between the Indians and the Crown. It did not concede that there had been a breach of fiduciary duty in the negotiation of the 1805 surrender such that there existed an outstanding lawful obligation on the part of Canada. The correspondence from the Assistant Deputy Minister also set out the compensation criteria by which Canada was willing to negotiate the claim and outlined various other conditions governing the negotiation process.[15] The Indian Claims Commission was notified of the government's decision by Assistant Deputy Minister Roy on the same day.[16]

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[9] Kim Fullerton, Legal Counsel for the Mississaugas of the New Credit First Nation, to Perry Robinson, Counsel, DIAND Legal Services, March 8, 1999 (ICC file 2105-7-2, vol. 1).

[10] Perry Robinson, Counsel, DIAND Legal Services, to David Osborn, QC, Commission Counsel, ICC, and Kim Fullerton, Legal Counsel for the Mississaugas of the New Credit First Nation, April 12, 1999 (ICC file 2105-7-2, vol. 1).

[11] ICC, Planning Conference Summary, April 13, 1999, and June 10, 1999 (ICC file 2105-7-2, vol. 1).

[12] ICC, Planning Conference Summary, July 27, 1999, and September 14, 1999 (ICC file 2105-7-2, vol. 2).

[13] ICC, Planning Conference Summary, October 19, 1999, and December 20, 1999 (ICC file 2105-7-2, vol. 2).

[14] Honourable Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief Bryan LaForme, Misssissaugas of the New Credit First Nation, July 23, 2002 (ICC file 2105-7-2, vol. 3).

As a result, the Commission has suspended its inquiry into the claim. This report is based on historical reports and documents submitted to the Commission by the Mississaugas of the New Credit and by the Department of Indian Affairs and Northern Development. The balance of the record in this inquiry is referenced as Appendix A to this report.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[17]

This Policy, outlined in the department's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[18] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

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[15] Michel Roy, Assistant Deputy Minister, DIAND, Claims and Indian Government, to Chief Bryan LaForme, Mississaugas of the New Credit First Nation, July 23, 2002 (ICC file 2105-7-2, vol. 3).

[16] Michel Roy, Assistant Deputy Minister, DIAND, Claims and Indian Government, to Ralph Brant, Director of Mediation, ICC, July 23, 2002 (ICC file 2105-7-2).

[17] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[18] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

A lawful obligation may arise in any of the following circumstances:

i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims, characterized as "Beyond Lawful Obligation":

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[19]

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

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[19] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171–85.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

The Mississaugas, a branch of the Ojibwa or Chippewa Indians, were occupying lands on the north shore of Lake Huron when they first encountered Europeans in the early 17th century.[20] To the south of the Mississaugas resided the Hurons, who at that time inhabited the lands around Georgian Bay south to the north shore of Lake Ontario. Across Lake Ontario, in present-day New York State, lay the territory of the Iroquois, who were organized into a confederacy of Five Nations.[21]

The Mississaugas had traditionally lived by fishing and hunting, but, like all original peoples in Ontario, they were eventually drawn into the fur trade. The development of this economic activity was a pivotal event in their history, as it was for all First Nations. By their participation in the fur trade, they gained access to European technology, such as weapons and ammunition, as well as other consumer goods. The acquisition of these goods came at a price, however. They became increasingly dependent on trade goods for their survival, and the competition for furs to satisfy the rival European mercantile interests eventually promoted strife between the Mississaugas and other nations living nearby.

The Mississaugas' first contact with Europeans had been with explorers and traders from New France. Over time, they, along with the Hurons, became allies of New France, both economically and militarily. The Mississaugas provided furs to the Hurons, who acted as middlemen in the trade with the French. In contrast, the Five Nations traded primarily with the Dutch, and later the British, which placed them in competition for furs with the First Nations located further north.

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[20] E.S. Rogers, "Southeastern Ojibwa," in *Handbook of North American Indians*, vol. 15: *Northeast*, vol. ed. Bruce G. Trigger (Washington: Smithsonian Institution, 1978), 760. As we wrote in ICC, *Chippewa Tri-Council Inquiry (Chippewas of Beausoleil First Nation, Chippewas of Georgina Island First Nation, Chippewas of Rama First Nation) Collins Treaty Claim* (Ottawa, March 1998), reported (1998) 10 ICCP 43: "It should be noted that 'Ojibwa,' 'Chippewa,' 'Saulteaux,' and 'Mississauga' all refer to peoples speaking similar and in some cases the same dialects of the Algonquian language. Although the names were often used interchangeably, as a general rule early settlers ... generally applied the term 'Mississauga' to those living along the north shore of Lake Ontario and in the Trent River Valley."

[21] In the 17th century, the Iroquois Confederacy consisted of the Mohawk, Oneida, Onondaga, Cayuga, and Seneca nations. In 1722, they were joined by the Tuscarora and became known as the Six Nations. Donald B. Smith, "Who Are the Mississauga?" in (1975) 67, no. 4 *Ontario History* 211–22.

By the mid-17th century, the competition for furs had escalated into warfare. As a result of the depletion of beaver in their homelands, the Iroquois Confederacy began to invade the territory of the Hurons around 1640 and had succeeded in completely displacing the latter by 1650.[22]

Now in control of the north shore of Lake Ontario, the Iroquois Confederacy pressed forward against the Ojibwa allies of the Hurons, including the Mississaugas, in order to maintain their access to the rich fur territory to the north. In this the Iroquois were initially successful. Better armed by the Dutch than the Hurons and Ojibwas had been by the French, the Iroquois were able to maintain control of the region for the next 40 years.[23]

Although the Mississaugas had been subject to attacks by the Iroquois throughout this period, they had not been defeated. When attacked in their own territory near Lake Huron, they were often able to repel or vanquish their attackers. They continued to trade with the French via the more northerly canoe routes leading to Quebec and Trois-Rivières. As a result, they were able to obtain more arms and ammunition.[24] They also benefited from New France's raids against the Iroquois, which were undertaken to ensure a steady supply of furs from its aboriginal trading partners.

During the latter part of the 17th century, the Iroquois Confederacy was seriously weakened by the wars with the French and by debilitating diseases.[25] As a result, the Confederacy concluded a peace agreement with New France in 1667 and ceased hostilities against the Mississaugas.[26] This situation gave the Mississaugas unimpeded access to their French trading partners and enabled them to trade with the Iroquois for better-priced British goods.

This period of stability continued until the 1690s. It enabled the Mississaugas not only to increase in number but also to consolidate their strength, as a result of the availability of more trade goods at a cheaper cost.[27] They did not remain content with the status quo, however. Beginning in 1695, the Ojibwas went on the offensive against the Iroquois Confederacy, in part to avenge the raids of the 1650s, and in part to eliminate the Iroquois as middlemen in the trade with the English.[28] In the course of this conflict, the Mississaugas began to penetrate into southern Ontario to engage in battles with the Iroquois. By 1700, the Mississaugas had succeeded in expelling the Iroquois and taken control of the north shore of Lake Ontario. In that year, representatives of the Mississaugas and other Ojibwa groups travelled to Onondaga, the capital of the Iroquois Confederacy, with an offer of peace. In exchange for the Confederacy's recognition of the Mississaugas' territorial control and an agreement to allow them direct access to English fur traders, the Mississaugas offered to cease hostilities. The offer of peace was accepted in June 1700, and as a result, the Mississaugas secured their control of the territory between Lake Huron and Lake Ontario.[29] They would occupy these lands until the land cessions of the late 18th and early 19th centuries confined them to a very small proportion of their former territory.

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[22] Elisabeth Tooker, "The Five (Later Six) Nations Confederacy, 1550–1784," in Edward S. Rogers and Donald B. Smith, eds. *Aboriginal Ontario: Historical Perspectives of the First Nations* (Toronto: Dundurn Press, 1994), 83.

[23] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 18–20.

[24] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 18–20.

[25] Donald B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. 2 *Ontario History* 68 (ICC Documents, p. 883 EC).

[26] Donald B. Smith, "Who Are the Mississauga?" in (1975) 67, no. 4 *Ontario History* 213–14.

SETTLEMENT OF THE MISSISSAUGAS ON THE NORTH SHORE OF LAKE ONTARIO

With their advantageous location on the shortest water routes from the interior to New France, and with equal access to the British in New York, the Mississaugas were about to enter a period of prosperity, which would continue for some 60 years. Competition between the French and the English for furs kept the price of fur high and that of trade goods low. Although the French had built forts on and near Lake Ontario to curtail Indian trade with the British, they were not able to prevent the Mississaugas from trading with both sides.

By the 1730s, it was estimated that the Mississaugas of southern Ontario numbered between 1,000 and 1,500 people.[30] Semi-nomadic, they spent the summers in villages near the mouths of rivers and creeks emptying into Lake Ontario, including Bronte Creek, Sixteen Mile Creek, the Credit River, Etobicoke Creek, and the Humber River. East of the Humber was a long peninsula (today the Toronto Islands) which, with the mainland, formed a deep harbour. To this place "the Mississauga brought their sick to recover in its health-giving atmosphere."[31] In addition, the Mississauga were settled at the Trent River, the Bay of Quinte (known as Kente), and as far east as Fort Frontenac (Kingston). In the fall and winter, however, they ventured north into their hinterland to hunt, both for food and for furs.

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[27] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 21.

[28] Donald B. Smith, "Who Are the Mississauga?" in (1975) 67, no. 4 *Ontario History* 215.

[29] Donald B. Smith, "Who Are the Mississauga?" in (1975) 67, no. 4 *Ontario History* 215–17.

[30] E.S. Rogers, "Southeastern Ojibwa," in *Handbook of North American Indians*, vol. 15: *Northeast*, vol. ed. Bruce G. Trigger (Washington: Smithsonian Institution, 1978), 762.

Although the fur trade allowed the Mississaugas to prosper during the first half of the 18th century, over time they became increasingly dependent upon European trade goods for their very survival. This situation was not a problem as long as those goods were readily available and inexpensive. Wars between the French and the English in Europe, and the resulting blockade of shipping routes to North America, however, caused a shortage in the supply of goods that had become necessities of life. As a consequence, the Mississaugas were drawn into foreign conflicts played out on North American soil, in the hope of plundering the necessary tools, implements, and weapons from the enemy of their European ally.[32]

Trade and plunder were not the only means of acquiring the valued trade articles. To ensure their economic and military loyalty, colonial authorities had developed the practice of giving "presents" to Indian nations. The presents, which included weapons, tools, and implements, were the primary vehicle of diplomacy between Europeans and First Nations. This method of maintaining alliances with the Mississaugas and others was extensively utilized by the French during the Seven Years' War, which broke out in 1756. Together with less quantifiable factors, such as the growing network of family ties between the Ojibwas and the French, the presents facilitated the alliance between the two, and the Mississaugas took the side of the French at the beginning of the war.[33]

As the war dragged on, however, the French were not able to keep themselves adequately supplied, much less maintain the level of presents formerly given to their Indian allies. When the French were defeated at Fort Niagara in 1759, the Mississaugas were motivated to meet with the British Superintendent of Northern Indians, Sir William Johnson, and to change sides.[34] In receipt now of Johnson's lavish presents,[35] the Mississaugas remained on the side of the British for the rest of the war.

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[31] Donald B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. 2 *Ontario History* 71 (ICC Documents, p. 883 EF).

[32] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 36–42.

[33] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 50.

[34] Donald B. Smith, "Who Are the Mississauga?" in (1975) 67, no. 4 *Ontario History* 221.

[35] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 60.

The British would not provide presents on the same grand scale indefinitely, however. After 1761, the quantity of presents was greatly reduced, as it was no longer considered necessary to incur expense in exchange for the loyalty of the First Nations of what would become Ontario.[56] In addition, the withdrawal of the French following the official cession of New France to Great Britain in 1763 enabled private British traders to raise the price of trade goods relative to the value of furs, thereby making the trade goods less accessible to the Indians. Together, these developments caused dismay and discontent among the Mississaugas, not only because they had viewed the presents as an acknowledgement of their sovereignty,[57] but also because the higher cost and resulting inaccessibility of European weapons, tools, and implements threatened their survival. Another alarming development consequent upon the withdrawal of the French was the increasing influx of settlers from the British colonies into the lands the Indians considered their own.[58] This phenomenon threatened their food supply and fostered discontent.

As a result, the next decade was characterized by intermittent violent conflict between the British and the Mississaugas, as the former struggled to establish their colonial control over the territories formerly held by the French. The Ojibwas, including some Mississaugas, had responded to the radical changes taking place around them by taking part in the Indian uprising known as the Pontiac War. Although the British had initially retaliated, they quickly came to understand that their colonial aims could only be achieved through long-term peace with the native inhabitants of the territory, and they took steps to restore their alliances with the Ojibwas.

The British recognized that, to allay some of the Indians' concerns, the purchase of Indian lands must be regulated. In 1763, King George III issued the *Royal Proclamation*, to establish how the newly acquired territories, including the portion of southern Ontario occupied by the Mississaugas, would be managed:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any

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[56] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 70.
[57] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 69.
[58] Olive Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), 180.

> purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie ...[39]

A central feature of this document was the recognition that "great Frauds and Abuses" had been committed by British subjects in the acquisition of Indian lands. Of equal significance was the provision that lands occupied by the First Nations in the interior of the continent were to be reserved to them exclusively. The *Proclamation* forbade the settlement of those territories by non-Indians and decreed that Indian land could only be alienated by negotiation and sale to the Crown.

Although the *Royal Proclamation* would have great historical and legal significance to all First Nations in the future, other conciliatory actions held more immediate relevance to the Mississaugas in the early years of the British administration. Primary among these was the reinstatement of the custom of bestowing presents, and by the time that the American Revolution broke out in 1775, the Mississaugas were again firmly allied with the British.[40]

During the American revolutionary war, the British supplied the Mississaugas with presents of iron axes, kettles, woollen clothing, guns, and ammunition in order to obtain their military assistance in raids against the American colonists.[41] A more insidious aspect of the British authorities' largesse was the increasing availability of alcohol, which, over the long term, contributed to cultural disintegration among many of the Ojibwas of southern Ontario. All of these factors increased the dependence of the Mississaugas on Europeans and their trade goods. As a consequence, the surrender of land in exchange for those goods would become an attractive option to the Mississaugas in future years.

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[39] *Royal Proclamation of 1763* (ICC Documents, pp. 1–7).

[40] Donald B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. *2 Ontario History* 71 (ICC Documents, p. 883 EF).

[41] Donald B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. *2 Ontario History* 71 (ICC Documents, p. 883 EF).

SURRENDER OF THE "CARRYING PLACE" AND TORONTO PURCHASE, 1787

By the terms of the Treaty of Paris, which formally ended the hostilities between Great Britain and its former American colonies, a boundary dividing the territories of the two was drawn through the middle of the Great Lakes. As a result, the importance of the land north of Lake Ontario increased dramatically, not only for its strategic and military value, but also as the destination of loyal British subjects fleeing the newly independent United States. The latter included many Iroquois who had remained loyal to the British Crown and had lost their homes and villages at the hands of the seceding American colonists.

As early as 1781, the Mississaugas had surrendered a strip of land along the entire west bank of the Niagara River from Lake Ontario to Lake Erie.[42] This transaction had arisen as a result of then Governor Haldimand's scheme to strengthen British military outposts on the Great Lakes by establishing agricultural settlements in their immediate vicinity.[43] In addition, the British authorities needed land for some of the Iroquois of New York state, who had been offered asylum in Canada. As a result, in 1783, the Mississaugas were persuaded to surrender land at Quinte for this purpose.

By the mid-1780s, the British authorities had decided to allow the loyalist refugees to settle in large numbers in the territory that the *Royal Proclamation* had decreed was Indian land. It was therefore necessary to acquire land from the Mississaugas for some 10,000 United Empire Loyalists who flooded into southern Ontario between 1783 and 1785.[44] As well, several thousand Iroquois under the leadership of Joseph Brant had indicated their desire to settle at the western end of Lake Ontario, rather than at Quinte. As a result, in 1784, the Mississaugas surrendered a huge tract of land in the Niagara peninsula, which included land on the Grand River for the Iroquois. For these lands the British gave £1,180 in trade goods, including clothing, guns, and ammunition.[45]

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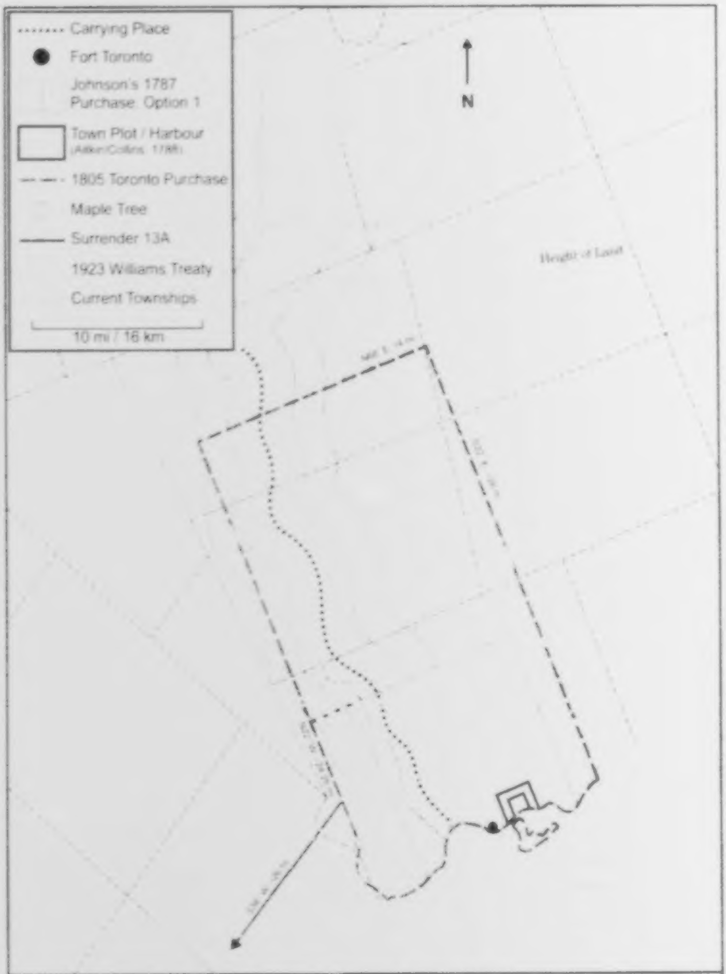
[42] Robert J. Surtees, "Land Cessions, 1763–1830," in Edward S. Rogers and Donald B. Smith, eds., *Aboriginal Ontario: Historical Perspectives of the First Nations* (Toronto: Dundurn Press, 1994), 97.

[43] Robert J. Surtees, "Indian Land Surrenders in Ontario: 1763–1867," unpublished paper, February 1984, p. 14 (ICC Exhibit 10).

[44] Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 105.

[45] Robert J. Surtees, "Land Cessions, 1763–1830," in Edward S. Rogers and Donald B. Smith, eds., *Aboriginal Ontario: Historical Perspectives of the First Nations* (Toronto: Dundurn Press, 1994), 102.


Carrying Place
Fort Toronto
Johnson's 1787 Purchase: Option 1
Town Plot / Harbour (Aitkin/Collins, 1788)
1805 Toronto Purchase
Maple Tree
Surrender 13A
1923 Williams Treaty
Current Townships
10 mi / 16 km
N
Height of Land

ICC Exhibit 14, Map 1: Fort Toronto as Reference Point, in Gwen Reimer and Jean-Phillipe Chartrand, Praxis Research associates, with Steven Prashker, GeoWare Consultants, "Final Report Pertaining to Map Preparation, Re: Mississaugas of New Credit First Nation Toronto Purchase Claim," Ottawa, 27 October 1999.

It was shortly after this exchange that a tract of land banding the north shore of Lake Ontario, as well as the "Carrying Place" of Toronto, came to the attention of the British colonial authorities. The Carrying Place was an ancient aboriginal portage from the mouth of the Humber River to the Holland River, part of the route from Lake Ontario to Lake Huron that wound northward via Lake Simcoe and from there to Georgian Bay. It had been in use long before the Mississaugas settled permanently on the shores of Lake Ontario and was well known to French explorers such as La Salle, who traversed it in the late 17th century on his way to and from the Mississippi.[46] After the Mississaugas arrived in the region, it remained part of the regular transportation route into their hinterland:

> They [the Mississaugas] termed the Humber "Cobechenonk" – "leave the canoes and go back" – for this was the beginning of the Toronto Carrying Place. Here they portaged their canoes northward to the Holland River, and paddled across Lake Simcoe. Then they took the Severn River to the Georgian Bay, crossed the huge lake named after their vanquished allies, then returned to their ancestral homeland, "Ojibwa Kechegame," "the big water of the Ojibwas," or Lake Superior.[47]

With the loss of British territory south of the lakes to the Americans, the Carrying Place assumed a new importance as a safe transportation route to the vast, fur-rich territories held by the British in the northwest interior of the continent. As a result, it was not long before enterprising individuals petitioned the British authorities for land along the portage route, or for the right to control transportation along its course.

The first of these was Montreal-based fur trader Benjamin Frobisher, who was associated with the recently organized North West Company. Recognizing that the Carrying Place afforded a relatively short canoe route to Lake Superior located entirely within British territory, he applied to the British authorities for land along the portage in 1784.[48] It appears that Lieutenant Governor Henry Hamilton subsequently instructed Frobisher to examine the relative merits of various existing portage routes north of Lake Ontario and to report on their suitability for inland transport. Frobisher's report, dated May 1785, strongly favoured the Toronto Carrying Place as the most practicable transport route in the region, and he suggested to Hamilton that there would be "no difficulty" in making the necessary purchase from the Mississaugas.[49]

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[46] Percy J. Robinson, "The Toronto Carrying-Place and the Toronto Purchase," in (1947) 39 *Ontario History* 44 (ICC Exhibit 6A).

[47] Donald B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. 2 *Ontario History* 70 (ICC Documents, p. 883 EE).

[48] Percy J. Robinson, "The Toronto Carrying-Place and the Toronto Purchase," in (1947) 39 *Ontario History* 47 (ICC Exhibit 6a).

As well, in 1785 Philippe-François de Rastel de Rocheblave, who had commanded a British post in Illinois during the first years of the American Revolution, applied for land at Toronto, which had been the site of a French military fort throughout the 1750s. Rocheblave had arrived in New France during the Seven Years' War and would have known that Toronto had been a profitable fur-trading centre during the French régime.[50] He was certainly aware of the advantages offered by Toronto as a safe harbour along an efficient transportation route to Lake Superior.[51] As a consequence, he proposed that he be granted a licence to transport goods and canoes along the Carrying Place to Lake Simcoe.

Concurrent with the above inquiries, the British authorities were considering how best to maintain strategic control of their western frontier. For some time they had pursued a policy of establishing settlements near their remaining forts along the newly established boundary with the United States. Although there had never been a British post at Toronto, the colonial authorities were persuaded of the value of the Toronto Carrying Place, and of the adjacent site of Toronto,[52] and decided to secure the land in question. As the land was subject to the terms of the *Royal Proclamation*, however, it became necessary to negotiate with the Mississaugas once more. To this end, on July 19, 1787, Governor Dorchester wrote to John Collins, the Deputy Surveyor General:

> It being thought expedient to join the settlements of the Loyalists near to Niagara, to those west of Cataraqui [Kingston], Sir John Johnson has been directed to take such steps with the Indians concerned, as may be necessary to establish a free and amicable right for Government to the interjacent lands not yet purchased on the north of Lake Ontario, for that purpose; as well as to such parts of the country as may be necessary on both sides of the proposed communication from Toronto to Lake Huron.[53]

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[49] Benjamin Frobisher, Trader, North West Company, to Hon. Henry Hamilton, Lieutenant Governor, Upper Canada, May 2, 1785 (ICC Documents, pp. 59–60).

[50] Percy J. Robinson, *Toronto during the French Regime*, 2nd ed. (Toronto: University of Toronto Press, 1965), 152.

[51] Percy J. Robinson, "The Chevalier de Rocheblave and the Toronto Purchase," in (1937) 3rd ser., 31 *Transactions of the Royal Society of Canada* sec. II, 135–36 (ICC Documents, pp. 238–39).

[52] Robert J. Surtees, "Indian Land Surrenders in Ontario: 1763–1867," unpublished paper, February 1984, pp. 35–36 (ICC Exhibit 10). Surtees suggests that the most northerly portion of the Carrying Place may have come to the attention of the colonial authorities as early as 1780 and that there may have been a prior attempt to obtain a surrender of that portion of the route from the northern Ojibwas of the district.

[53] Lord Dorchester, Captain General and Governor in Chief, to John Collins, Deputy Surveyor General, July 19, 1787, Bureau of Archives for the Province of Ontario, *Third Report*, 1905, 379 (ICC Documents, p. 68).

Superintendent General of Indian Affairs Sir John Johnson and his party arrived at the Bay of Quinte in September of that year to meet with the Mississaugas who occupied the lands in question. What discussions or negotiations actually took place, however, remain obscure. To begin with, the September 23, 1787, surrender document did not describe the physical boundaries or the quantity of land surrendered, nor did the body of the document name the Chiefs of the bands from whom the surrender was taken. At the end of the document, the names of three Chiefs, Wabakinine, Neace, and Pakquan, together with their totems, appeared on slips of paper that had been attached to the document. The witnesses to the surrender were stated to be John Collins, Louis Protle, and interpreter Nathaniel Lines.[54]

The only extant descriptions of this meeting postdate the actual event and contradict one another as well as the surrender document itself. One such account, from a traveller and trader claiming to have been present, refers to the Bay of Quinte meeting as taking place on September 19, 1787:

> At twelve o'clock the next day [September 19] a council was held and Sir John laid his map before them, desiring a tract of land from Toronto to Lake Huron. This the Indians agreed to grant him and the deed of gift being shown them, it was signed by the chiefs affixing the emblem, or figure of their respective totems, as their signatures.[55]

Another account was given by the interpreter Nathaniel Lines to the Deputy Superintendent General of Indian Affairs, Alexander McKee:

> Mr. Nathaniel Lines Indian Interpreter at Kingston says he was present at the Head of the Bay of Quinté where he witnessed the Blank Deed supposed by him at the time to be a proper Deed of Conveyance of Lands from the Mississaugas resorting to the Bay of Quinté, the Rice Lake and Lac La Clie [Lake Simcoe] – Commencing at the Head or carrying place of the Bay of Quinté to a Creek called Tobeka [Etobicoke] from seven to fourteen miles above Toronto with a Reservation of the Rice Lake and of a certain place which Mr. Lines does not recollect between the said Rice Lake and Lake Ontario, but the lands intended to be sold and purchased at that time are connected all the way in front on Lake Ontario running in depth 10 or 12 Miles nearly as far as

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[54] Surrender, September 23, 1787, in *Canada, Indian Treaties and Surrenders, from 1680 to 1890* (Ottawa: Brown Chamberlin, 1891; reprint, Saskatoon: Fifth House Publishers, 1992), I: 32–34 (ICC Documents, pp. 69–71).

[55] Union of Ontario Indians, "Mississauga Tribal Claims Council, Claim to Toronto Purchase Lands in Southern Ontario Summary of Claim," June 10, 1986 (ICC Exhibit 2), 12–13, citing M.M. Quaife, ed., *John Long's Voyages and Travels in the Years 1768–1788* (Chicago: Lake Side Press, 1922), 222–23 (ICC Documents, pp. 445–46).

> the Rice Lake and above the Rice Lake a Common days Journey back as far as Toronto.
>
> Mr. Lines further says that Sir John Johnson, Mr. Collins the Surveyor and several others were present, and that immediately after the delivery of the goods which were the Consideration for the lands, he Mr. Lines was called to witness the Blank Deed (now shewn to him but supposed to have been regularly drawn) and he further says that he saw the Indians make their marks upon the Slips of Paper which were wafered on the Deed before the Marks were made thereon.[56]

Sir John Johnson recalled the event as follows:

> Though there were no General Instructions at that period that I recollect for my guidance in the purchase of Lands from the Indians, I followed the mode that has been observed on former occasions as far as local Circumstances and the absence of the Governor would permit – and according to the [illegible] of my recollections the purchase was duly executed, not only by the Indians but by myself on the part of the King, in the presence of Mr. Collins, Mr. Langan, Mr. Lines the Interpreter, Mr. Chambers, Clerk to Mr. Collins now, I think, in Quebec, and a number of other persons. – The Description must have been according to the purchase, ten miles square at Toronto, and two or four Miles, I do not recollect which, on each side of the intended road or Carrying Place leading to Lac le Clai [Simcoe], then ten miles square at the Lake and the same square at the end of the water communication emptying into Lake Huron – this Deed was left with Mr. Collins, whose Clerk drew it up to have the courses inserted when the Survey of these Tracts were completed and was never returned to my Office.[57]

Documents from the records of the Department of Indian Affairs include a "Distribution of Arms, Ammunition, & Tobacco made by Sir Johnson ... to the Missesagey Indians assembled at the Head of the Bay de Quinte the 23rd September, 1787." This list referred to a "formal cession of lands on the north side of Lake Ontario" and to the fact that the goods were distributed not only to those Mississaugas assembled at Quinte, but also to those members of the "same Nation" who were located at Toronto and River Le Trench [Thames], a total of 1,017 persons.[58] As well, in a letter dated October 19 of that year, Johnson stated that he had recently presented approximately 1,000 members of the Mississauga Nation with goods to the value of £2,000, "for their readiness in giving their Country to the Loyalists."[59]

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[56] A. McKee, DSGIA, "Statement of Nathaniel Lines," June 10, 1795, National Archives of Canada [hereafter NA], RG 10, vol. 9, pp. 8812–9222 (ICC Documents, pp. 203–4).

[57] Sir John Johnson, Superintendent, Department of Indian Affairs, Quebec, to James Green, Military Secretary, Quebec, March 26, 1798, in Percy J. Robinson "The Chevalier de Rocheblave and the Toronto Purchase," in (1937) 3rd ser., 31 *Transactions of the Royal Society of Canada* sec. II, 144–46 (ICC Documents, pp. 247–49).

[58] "Distribution List," n.d., NA, RG 10, vol. 10029 (ICC Documents, pp. 73–74).

The British were evidently satisfied that they had concluded a valid purchase with the Mississaugas, as they took steps the following year to have the parcel surveyed. On July 7, 1788, Deputy Surveyor General Collins instructed Alexander Aitken to conduct a survey of the land purchased the year before. Aitken arrived at Toronto on August 1 and, in accordance with his instructions, began by attempting to establish the eastern boundary of the parcel at the "lower end of the beach which forms the Harbour," which has been interpreted by the Mississaugas of the New Credit First Nation as referring to the end of Ashbridges Bay.[60] A local Mississauga Chief objected to that location, insisting that his people had not sold any land east of the Don River. With the assistance of interpreter Nathaniel Lines, Aitken held discussions with Mississauga leaders and, by August 11, had secured their agreement to his original eastern boundary point.[61] The survey then proceeded westward to the Humber River, beyond which the Indians would not let him continue, as they again disputed the extent of the land that had been sold. Colonel Butler, a prominent military officer and a subordinate of Sir John Johnson, held discussions with the Mississaugas on this issue, and, as a result, Aitken was able to continue further west, establishing the western boundary at Etobicoke Creek. He began to survey the western boundary perpendicular to the lake, but was able to run the line only some two and three-quarter miles inland, before deciding to halt the work to avoid any more disputes with the local Chiefs.[62] During that summer, Aitken also surveyed a town plot for the future settlement of Toronto.[63]

Some of the confusion surrounding the 1787 surrender stems from the obvious discrepancy between the extent of land surveyed by Aitken in 1788 and the recollection of Sir John Johnson: the distance from Ashbridges Bay to the Etobicoke Creek exceeds the "ten miles square" apparently originally contemplated by Sir John Johnson. The historical record is further obscured by Nathaniel Lines's statement that the surrendered tract extended 10 or 12 miles inland to Rice Lake. Rice Lake is located north of Port Hope, many miles east of the eastern boundary of the purchase. It may be that the above confusion arose as a result of an additional purchase of land east of Toronto from the Mississaugas in August 1788. Surveyor Aitken's report of September 15, 1788, refers to a new land purchase that summer extending eastward from Toronto to Pemitescutiang (Port Hope).[64] Colonel Butler, in a report to Sir John Johnson dated August 26, 1788, advised that the purchase extended further east to the Bay of Quinte:

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[59] Sir John Johnson, Superintendent, Department of Indian Affairs, Quebec, to Daniel Claus, Department of Indian Affairs, October 19, 1787, NA, MG 19, vol. 4, reel C-1478 (ICC Documents, p. 78).

[60] Kim Fullerton, Legal Counsel for the Mississaugas of the New Credit First Nation, to Perry Robinson, Counsel, DIAND Legal Services, March 8, 1999, p. 6 (ICC file 2105-7-2, vol. 1).

[61] Alexander Aitken, Surveyor, Government of Quebec, to John Collins, Deputy Surveyor General, Government of Quebec, September 15, 1788, in Percy J. Robinson, *Toronto during the French Regime*, 2nd ed. (Toronto: University of Toronto Press, 1965), 166–68 (ICC Documents, pp. 88–90).

[62] Alexander Aitken, Surveyor, Government of Quebec, to John Collins, Deputy Surveyor General, Government of Quebec, September 15, 1788, in Percy J. Robinson, *Toronto during the French Regime*, 2nd ed. (Toronto: University of Toronto Press, 1965), 166–68 (ICC Documents, pp. 88–90).

[63] "Plan of Toronto by Alex. Aitken, 1788," NA, National Map Collection, No. 45212 (ICC Exhibit 8A).

> I called them [Mississaugas] to Council and made a Proposal to purchase all the Lands to the Bay of Quinty, and as far back as Lake La Clay [Simcoe] and the Rice Lake, which, after two or three meetings, they agreed to. I then proposed to them to run a Strait Line from the place of Beginning above Toronto 15 or 16 miles Back as that being supposed to be the breadth from the Clay bank to the said Place of beginning.[65]

Notwithstanding that no deed of surrender was ever taken,[66] it appears that Colonel Butler believed that the British now owned a large block of land on the north shore of Lake Ontario extending from the mouth of Etobicoke Creek ("Place of beginning") on the west to the Bay of Quinte on the east. Whether this was an entirely new purchase, or an extension and clarification of the 1787 purchase, is a matter of interpretation.[67] In any event, the vagueness of the original 1787 surrender document, together with the many discrepancies in the accounts of its surrounding circumstances, presaged future doubts as to the surrender's validity.

In 1791, the Province of Quebec was divided into Upper and Lower Canada. Shortly afterwards, in contemplation of the continuing settlement of the upper province, the authorities took steps to survey the lands purchased in 1787 and 1788 into counties. The influx of settlers caused great consternation among the Mississaugas, however, as the newcomers encroached on their fisheries and denied them the right to cross patented land. The

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[64] Alexander Aitken, Surveyor, Government of Quebec, to John Collins, Deputy Surveyor General, Government of Quebec, September 15, 1788, in Percy J. Robinson, *Toronto during the French Regime*, 2nd ed. (Toronto: University of Toronto Press, 1965), 166–68 (ICC Documents, pp. 88–90).

[65] Extract of a letter from Lt.-Col. Butler to Sir John Johnson, August 26, 1788, in Bureau of Archives for the Province of Ontario, *Third Report*, 1905, 410 (ICC Exhibit 9, tab 2).

[66] Percy J. Robinson, "The Chevalier de Rocheblave and the Toronto Purchase," in (1937) 3rd ser. 31 *Transactions of the Royal Society of Canada* sec. II, 145 (ICC Documents, p. 248).

[67] Robert J. Surtees, "Indian Land Surrenders in Ontario: 1763–1867," unpublished paper, February 1984, pp. 38–40 (ICC Exhibit 10).

Mississaugas began to understand that the purchases of the 1780s were not agreements to share the land but, rather, were outright surrenders. They began to protest to government officials, and on occasion their discontent and frustration led to raids on settlers' farms.[68]

For their part, British administrators were aware of the irregularities in the 1787 surrender and were concerned that their security of tenure in the lands purchased in 1787–88 had been compromised.[69] This was a significant concern, not only because of the many improvements that settlers had made on patented land, but also because the colonial authorities intended to establish the capital of Upper Canada at Toronto.

The newly appointed Lieutenant Governor of Upper Canada, John Graves Simcoe, took it upon himself to investigate the status of the 1787 purchase. His concerns had first arisen in the course of his proposed acquisition of Penetanguishene, located on Georgian Bay near the northern terminus of the Toronto Carrying Place route. In the course of his investigation he contacted colonial administrators for copies of the surrender deeds respecting the Carrying Place and the Toronto purchase. In January 1794, he received a letter from Governor General Dorchester regarding the existence of the largely blank 1787 surrender document:

> a Plan (Copy of which I believe was given to you) has been found in the Surveyor General's Office, to which is attached a blank deed, with the names or devices of three Chiefs of the Mississauga Nation, on separate pieces of paper annexed thereto, and witnessed by Mr. Collins, Mr. Kotte, a Surveyor, since dead, and Mr. Lines, Indian Interpreter, but not being filled up, is of no validity, or may be applied to all the Land they possess; no Fraud has been committed or seems to have been intended. It has, however, an omission which will set aside the whole transaction, and throw us entirely on the good faith of the Indians for just so much Land as they are willing to allow, and what may be further necessary must be purchased anew, but it will be best not to press that matter or show any anxiety about it.[70]

Notwithstanding Dorchester's unequivocal advice regarding the surrender's invalidity, Simcoe proposed to rectify the situation by having the blanks on the document filled in in the presence of the two surviving Chiefs who had originally participated in the transaction.[71] In response, Dorchester advised that no further action should be taken because of the absence from Canada of Sir John Johnson, who had presided at the original surrender, and who, as Superintendent General, was required to be present at all land negotiations with the Indians.[72]

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[68] Donald B. Smith, "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. 2 *Ontario History* 70 (ICC Documents, pp. 883 EJ–883 EK).

[69] Robert J. Surtees, "Indian Land Surrenders in Ontario: 1763 –1867," unpublished paper, February 1984, p. 42 (ICC Exhibit 10).

[70] Lord Dorchester, Captain General and Governor in Chief, to J.G. Simcoe, Lieutenant Governor, Upper Canada, January 24, 1794, in E.A. Cruikshank, ed., *The Simcoe Papers*, vol. 2 (Toronto: Ontario Historical Society, 1924), 137 (ICC Documents, pp. 163–64).

In December 1794, Dorchester wrote to Alexander McKee, who had been appointed Deputy Superintendent General of Indian Affairs during Johnson's absence, enclosing a copy of the blank surrender deed of 1787. He advised McKee of the background to the 1787 purchase, stating that the "proceedings are so informal and irregular as to invalidate and set aside the whole transaction," and that the deed itself was "of no validity or value."[73] He advised McKee that no use was to be made of the document, that it was forwarded only to make him aware of what had transpired. It appears that McKee then undertook his own investigation, including obtaining the statement from interpreter Nathaniel Lines, quoted earlier, regarding the circumstances surrounding the 1787 purchase. McKee clearly believed that the purchase would soon be rectified, as he intended to show the 1787 document to the Mississaugas in the course of a new meeting at which the transaction would be made legal.[74] For reasons that are unknown, however, no meeting took place, and there was no further action on the matter for several years.

FORMALIZING THE TORONTO PURCHASE, 1805

The Toronto purchase would not again come to the attention of the colonial authorities until 1797. By that time, Simcoe had been recalled, and had been replaced by Peter Russell as administrator of Upper Canada, pending the appointment of a new lieutenant governor. Russell had arrived in office amid a state of high tension between the settlers and the Mississaugas. Some of this tension stemmed from the murder of Chief Wabakinine in 1796 by a British soldier.[75] This serious incident served to rekindle old resentments among the Mississaugas, and for a while the settlers feared an Indian uprising. The grievances of longest standing, however, concerned land issues, and Russell found his new administration enmeshed in a tangle of land disputes involving the settlers and the Mississaugas. As a result, the precarious state of the government's land tenure, as well as the need to acquire additional land for settlers, became issues of importance to colonial administrators.

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[71] J.G. Simcoe, Lieutenant Governor, Province of Upper Canada, to Lord Dorchester, Captain General and Governor in Chief, March 3, 1794, in E.A. Cruikshank, ed., *The Simcoe Papers*, vol. 2 (Toronto: Ontario Historical Society, 1924), 174 (ICC Documents, p. 165).

[72] Lord Dorchester, Captain General and Governor in Chief, to J.G. Simcoe, Lieutenant Governor, Upper Canada, September 22, 1794, in E.A. Cruikshank, ed., *The Simcoe Papers*, vol. 3 (Toronto: Ontario Historical Society, 1924), 104 (ICC Documents, p. 178).

[73] Lord Dorchester, Captain General and Governor in Chief, to Alexander McKee, Deputy Superintendent General, Department of Indian Affairs, December 24, 1794, NA, RG 10, vol. 8, pp. 8124–8811 (ICC Documents, pp. 192–94).

[74] Alexander McKee, Deputy Superintendent General, Department of Indian Affairs, to Lord Dorchester, Captain General and Governor in Chief, July 3, 1795, NA, RG 10, vol. 9, pp. 8812–9222 (ICC Documents, pp. 205–19).

Russell's ability to resolve these disputes was severely hampered by his lack of clear information regarding the ownership of the land in question – in particular, the terms of the original surrenders. In September 1797, he wrote to the new Governor General, Robert Prescott, asking for copies of the deeds in question, including the 1787 deed of the Toronto purchase.[76] The following month, Prescott replied, advising Russell that it would serve no useful purpose to send him a copy of the 1787 surrender deed "as that transaction is totally invalid, none of the blanks having been filled up."[77] Russell replied:

> Having laid before His Maj's Executive Council for this Province the part of your Excy's letter No. 26 in answer to mine No. 30, with the papers therein enclosed, we were exceedingly alarmed on reading the Paragraph which related to the Purchase made at Toronto in 1797 [sic, 1787?], which if more generally known, would probably shake the Tranquillity of many respectable Persons, who have risked nearly their whole Property within its Limits. *For should the whole of that Transaction be invalid*, as your Excy and Lord Dorchester have judged it to be, the Kings right to any Part of the Land between the Rivers Etobicoak & Don, may become very doubtful; and our tenure of the intermediate Space (involving a great many cultivated farms, as well as the Seat of Government) might consequently be at the Mercy of the Messissagues, who, if they were apprized of the Circumstance, might be induced to give trouble with a view of making their own advantages from it.[78]

Russell then proposed a solution, which would require the government to be less than candid with the Mississaugas. The plan involved the surrender of some new lands adjacent to the Toronto purchase, and, without drawing too much attention to the fact, a recapitulation of the 1787 transaction in the new deed of purchase, which would be signed by the Mississaugas.[79]

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[75] Donald B. Smith "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. 2 *Ontario History* 76 (ICC Documents, p. 883 EK).

[76] Peter Russell, Administrator, Upper Canada, to Robert Prescott, Governor in Chief, Quebec, September 21, 1797, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 1 (Toronto: Ontario Historical Society, 1925), 284–85 (ICC Documents, p. 231).

[77] Robert Prescott, Governor in Chief, Quebec, to Peter Russell, Administrator, Upper Canada, October 21, 1797, NA, RG 10, vol. 2330, file 67071-3, pt. 2, reel C-11202 (ICC Documents, p. 232).

[78] Peter Russell, Administrator, Upper Canada, to Robert Prescott, Governor in Chief, Quebec, January 21, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 68–69 (ICC Documents, pp. 237–38). Emphasis in original.

Before advising Russell of his decision on this plan, Governor General Prescott consulted Sir John Johnson for a full report on the original transaction.[80] Johnson replied that the Indians had been fully compensated and that he had never heard them deny the 1787 sale, but that to ease the minds of administrators it would be advisable to have the Mississaugas sign a survey plan and a new deed dealing with all purchases north of Lake Ontario since 1784.[81] Prescott decided that he preferred a variation of Johnson's plan rather than the deceptive proposal made by Russell. He advised Russell that the latter's plan

> is a measure I cannot agree to, on account of its tendency to mislead the Indians, and would be productive of the most dangerous consequences to the King's Interest, as soon as they should discover, that they had not been openly dealt with ... It would in my opinion, be preferable to renew the Purchase altogether, than to risk the consequences that would inevitably follow, if your Plan was put in practice. I should conceive, therefore, that to remedy the existing difficulty ... a New Deed of the Purchase in question should be executed with the Messissagua [sic] Indians.[82]

In the meantime, a number of Ojibwa leaders from Lakes Simcoe and Huron had travelled to Toronto, now renamed York, to complete the Penetanguishene purchase initiated by former Lieutenant Governor Simcoe. Prescott's letter, above, happened to arrive at the same time as the Chiefs' visit, and, as a result, Russell used the occasion to ascertain the Chiefs' understanding of the boundaries of the 1787 agreement. At the meeting, Chief Yellowhead, through an interpreter, apparently confirmed that the lands south of Lake Simcoe, including the Carrying Place, had been sold in accordance with the government's understanding.[83] Russell wrote to Prescott the next day to advise him of the Chiefs' reaction and to inform him that the Executive Council was of the opinion that, in light of the views expressed by the Indians, it was no longer necessary to obtain a new deed for the Toronto purchase.[84]

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[79] Peter Russell, Administrator, Upper Canada, to Robert Prescott, Governor in Chief, Quebec, January 21, 1798, in E.A. Cruikshank, *ed.*, *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 68–69 (ICC Documents, pp. 237–38).

[80] James Green, Military Secretary, Quebec, to Sir John Johnson, Superintendent, Department of Indian Affairs, Quebec, March 12, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 117–18 (ICC Documents, pp. 243–44).

[81] Sir John Johnson, Superintendent, Department of Indian Affairs, Quebec, to James Green, Military Secretary, Quebec, March 26, 1798, in Percy J. Robinson, "The Chevalier de Rocheblave and the Toronto Purchase," in (1937) 3rd ser., 31 *Transactions of the Royal Society of Canada* sec. II, 144–46 (ICC Documents, pp. 247–49).

[82] Robert Prescott, Governor in Chief, Quebec, to Peter Russell, Administrator, Upper Canada, April 9, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 137–38 (ICC Documents, pp. 258–59).

It may be that the fears of the Executive Council were not completely alleviated, however, for it subsequently ordered the Land Board of Upper Canada to investigate and report how Indian lands might best be acquired and disposed of.[85] The report of the Land Board was read at a meeting of the Executive Council on October 22, 1798. It clearly stated that, if the Indians were to become aware of the true value of land in Upper Canada, the cost of that land to the government would rise dramatically. As a result, the board recommended:

> In order therefore to exercise that foresight which our Indian neighbours are but beginning to learn, and in which it certainly cannot be our interest to promote their improvement, we submit to your Honor's consideration the propriety of suspending the promulgation of the plan which has been laid down for us untill [sic] we can make a purchase sufficiently large to secure to us the means of extending the population and encreasing [sic] the strength of the Province, *so far as to enable us before our stock is exhausted to dictate instead of soliciting the terms on which future acquisitions are to be made* – For we are satisfied that the purchase of 50 or even 100 Townships, if made now, will cost us less than the purchase of ten after the promulgation of the Governor General's plan.[86]

The colonial authorities had already experienced some hard bargaining as a result of the Indians' growing awareness of the value of their lands. The previous year, the British had attempted to purchase the "Mississauga tract," which was the stretch of unsurrendered land between the western boundary of the Toronto purchase and Burlington Bay. From the perspective of the colonial authorities, the acquisition of this large tract was necessary to carry out their stated policy to populate southern Ontario with agricultural immigrants.[87] However, the authorities wished to acquire the land from the Mississaugas at a very nominal price, so they could use the profit from its resale to fund the construction of roads and canals necessary for the development of Upper Canada. The government price was far below that obtainable in the open market, which had been established when Joseph Brant, in defiance of the *Royal Proclamation*, sold some of the Iroquois' land on the Grand River to private parties. Consequently, when government officials had approached the Mississaugas to sell the tract in October 1797, they had insisted on a price for the land that was considered by the government to be excessive, and which it refused to pay. As a result, no sale was concluded at that time.[88]

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[83] Peter Russell, Administrator, Upper Canada, to Robert Prescott, Governor in Chief, Quebec, May 23, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 159–61 (ICC Documents, pp. 271–73). Whether these particular Chiefs had the right to validate the Toronto purchase is a separate issue.

[84] Peter Russell, Administrator, Upper Canada, to Robert Prescott, Governor in Chief, Quebec, May 23, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 159–61 (ICC Documents, pp. 271–73).

[85] Mississaugas of the New Credit, *Toronto Purchase Claim*, June 10, 1986 (ICC Exhibit 2, p. 52).

[86] Upper Canada, Executive Council, Minutes, October 2, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 290–91 (ICC Documents, pp. 286–87). Emphasis added.

The Land Board's plans to dictate the terms of land purchases had been further thwarted by the decision of the Mississaugas to conclude an alliance with the Iroquois on the Grand River. The Mississaugas had gradually become aware of the implications inherent in "surrenders" and "purchases," and they realized that they needed allies in their dealings with the British. The Mississaugas knew that the Six Nations had extensive experience with the British in New York, and they were also aware of Brant's private sales of land on the Grand River, which the local authorities had not succeeded in overturning. To assist them in their negotiations with the British, the Mississaugas had appointed Joseph Brant as their "guardian and agent"[89] in land matters in April 1798. Subsequently, Brant began negotiations with the authorities for the sale of the Mississauga tract, asking a price that was unprecedented for a government purchase. As a result, the British would not conclude an agreement for the land, and the confirmation of the Toronto purchase was not pursued.

The British then realized that they needed to change their tactics. Lord Portland, the Colonial Secretary, devised a strategy to regain the upper hand in dealings with the Mississaugas. First, he instructed colonial administrators to attempt to foment jealousy and discord between the Iroquois and the Mississaugas, in order to weaken Brant's influence.[90] Secondly, presents were no longer to be distributed to the Mississaugas as of right, but only as a reward for good behaviour.[91] Finally, Lord Portland instructed Administrator Peter Russell to refuse to purchase any Mississauga land at all, while at the same time preventing any private sales, so that the land would lose its value in the eyes of the Mississaugas. The theory was that, to maintain the goodwill of the authorities and ensure the continued provision of presents, the Indians would eventually be willing to sell land at the low government price.[92]

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[87] Leo A. Johnson, "The Mississauga – Lake Ontario Land Surrender of 1805," in (1990) 83, no. 3 *Ontario History* 233–34 (ICC Exhibit 13).

[88] Leo A. Johnson, "The Mississauga – Lake Ontario Land Surrender of 1805," in (1990) 83, no. 3 *Ontario History* 238–39 (ICC Exhibit 13), citing "Memoir of William Dummer Powell," November 1, 1797, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 19–22.

[89] Leo A. Johnson, "The Mississauga – Lake Ontario Land Surrender of 1805," in (1990) 83, no. 3 *Ontario History* 239 (ICC Exhibit 13).

[90] Donald B. Smith "The Dispossession of the Mississauga Indians: A Missing Chapter in the Early History of Upper Canada," in (1981) 73, no. 2 *Ontario History* 80 (ICC Documents, p. 883 EO).

By the beginning of the 19th century, the old hostilities between the Six Nations and the Mississaugas began to resurface, and Brant's influence began to wane. As well, the deliberate policy mandating that the annual presents of European goods were to be conditional upon good behaviour likely weakened the Mississaugas' resolve to insist upon market value for the sale of their land. The colonial administrators took the opportunity to pursue the issue of land surrenders once more, and the rectification of the Toronto purchase was again at the forefront of their dealings with the Mississaugas.

Concurrent with the need to obtain new land for agricultural settlement was the need to secure the government's title to its own capital city.[93] As a result, the Lieutenant Governor, now Peter Hunter, ordered his officials to obtain a new deed of surrender for the 1787 purchase at the same time that new negotiations for the Mississauga tract were to take place.[94] In preparation for the meetings with the Mississaugas, the Deputy Superintendent General of Indian Affairs, William Claus, directed surveyor William Chewitt to prepare two plans, each depicting a different western boundary for the Toronto purchase. According to Chewitt's letter transmitting the plans to Claus, the first plan was drawn according to "the Survey made by Mr Jones"[95] and the second was drawn according to "that which you were pleased to say the Indians conceived to be the true Boundary."[96] It is likely that the first plan placed the western boundary at Etobicoke Creek, as that was the boundary drawn by Alexander Aitken in 1788, and it is possible that the second plan placed the boundary at the Humber, as originally asserted by the Mississaugas in that same year. Clearly, Claus contemplated two possible outcomes of his forthcoming meetings with the Mississaugas regarding the Toronto purchase.

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[91] Leo A. Johnson, "The Mississauga – Lake Ontario Land Surrender of 1805," in (1990) 83, no. 3 *Ontario History* 244 (ICC Exhibit 13), citing Portland to Russell, November 5, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 300.

[92] Leo A. Johnson, "The Mississauga – Lake Ontario Land Surrender of 1805," in (1990) 83, no. 3 *Ontario History* 244 (ICC Exhibit 13), citing Portland to Russell, November 5, 1798, in E.A. Cruikshank, ed., *The Russell Papers*, vol. 2 (Toronto: Ontario Historical Society, 1925), 300.

[93] Robert J. Surtees, "Indian Land Surrenders in Ontario: 1763–1867," unpublished paper, February 1984, p. 61 (ICC Exhibit 10).

[94] The concurrent timing of these two transactions was also undoubtedly dictated by the need to determine the extent of the 1787 purchase before the eastern boundary of the Mississauga tract could be defined.

[95] Possibly Augustus Jones, the Deputy Surveyor, who was working in the Lake Simcoe area in 1794. See W. Chewitt to E.B. Littlehales, August 31, 1794, in E.A. Cruikshank, ed., *The Simcoe Papers*, vol. 3 (Toronto: Ontario Historical Society, 1924), 24 (ICC Exhibit 7, tab 3).

[96] W. Chewitt, Senior Surveyor and Draftsman, to Colonel William Claus, Deputy Superintendent General, July 30, 1805, NA, RG 10, vol. 26, pp. 14966–15599 (ICC Documents, pp. 305–8).

The first meeting between William Claus and the Mississaugas took place on July 31, 1805, at the Credit River. According to minutes taken at the time, Claus informed the Mississaugas that the exact limits of the 1787 purchase had not been adequately defined at the time of the original negotiations, and that he wished to ascertain their view as to the correct boundary, so that a new deed could be drafted and executed. Chief Quinepenon, the spokesman for the Mississaugas, stated:

> [A]ll the Chiefs who sold the Land you speak of are dead and gone. I now speak for all the Chiefs of the Mississaugues; We cannot absolutely tell what our old people did before us, except by what we see on the plan now produced & what we remember ourselves and have been told.[97]

It appears from the above that the Mississaugas were shown only one plan, and it also appears that the plan in question placed the western boundary of the Toronto purchase at Etobicoke Creek:

> Our old Chiefs told us that the line was on the East side of the Etobicoke following the courses of the River upwards from its mouth to the most Easterly bend of the same two or three miles up in a strait line. That the River then runs from the westward, but a continuation of that strait line from the mouth of the River and intersecting that Easterly bend was the boundary. It was then agreed Father that all the Lands on the west side of the River should remain to us & all on the East side to the King until the strait line from the mouth of the River out that Easterly bend & then that same line was continued & left the River to the westward. And our old Chiefs at the same time particularly reserved the fishery of the River to our Nation.[98]

The formal deed of surrender confirming the Toronto purchase was drawn up and executed on August 1, 1805, the date that the surrender of the Mississauga tract was negotiated. In addition to confirming the 1787 transaction made with Sir John Johnson, the deed included a detailed legal description of the boundaries of the surrendered parcel, which comprised some 250,880 acres of land, and which was made subject to the First Nation's right to fish in Etobicoke Creek. The total consideration for the Indians' consent to the above was 10 shillings.[99]

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[97] "Proceedings of a Meeting with the Mississagues at the River Credit 31st July 1805," NA, RG 10, vol. 1, reel C-10996 (ICC Documents, pp. 509–12).
[98] "Proceedings of a Meeting with the Mississagues at the River Credit 31st July 1805," NA, RG 10, vol. 1, reel C-10996 (ICC Documents, pp. 509–12).

During the July 31 negotiations, the Mississaugas had also requested presents in exchange for their cooperation in the transaction:

> We hope you will consider us on this occasion and give us something. We have heretofore been satisfied with what our Father had given us, but we hope for something more than ordinary on the completion of this business. We have always told you the truth & we hope our general conduct has deserved your approbation.[100]

The Deputy Superintendent's reply was that

> he had it not at present in his power but he will report their request to the Governor and hopes from his representation of their conducts the General may be induced to comply with their request.[101]

Notwithstanding the request, it appears that no further payment was made for the land.

After the surrender of the Mississauga tract and the confirmation of the Toronto purchase, the colonial government was in control of all of the northern shoreline of Lake Ontario. Future surrenders would eventually relegate the Mississaugas to a few small pockets of land, as settlers flooded into Upper Canada to take up the fertile farmland. As one historian has written:

> [W]ith the richest of their fishing waters depleted or effectively closed to them and the most fertile soil surrendered, and with increased competition in the northern areas from the whites for the remaining game and fur-bearing animals, the fragile hunting and gathering economy of the Lake Ontario Mississaugas collapsed. The old seasonal harvest of natural crops was destroyed, never to be regained. ... The government's stated policy of impoverishing the Indians for the economic benefit of the new colony had had its inevitable consequence.[102]

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[99] "Principal Chiefs of the Mississaugue Nation to His Majesty the King," Surrender Instrument, August 1, 1805, NA, RG 10, vol. 1, reel 10996 (ICC Documents, pp. 318–23).

[100] "Proceedings of a Meeting with the Mississagues at the River Credit 31st July 1805," NA, RG 10, vol. 1, reel C-10996 (ICC Documents, pp. 309–12).

[101] "Proceedings of a Meeting with the Mississagues at the River Credit 31st July 1805," NA, RG 10, vol. 1, reel C-10996 (ICC Documents, pp. 309–12).

[102] Leo A. Johnson, "The Mississauga – Lake Ontario Land Surrender of 1805," in (1990), 83, no. 3 *Ontario History* 249–50 (ICC Exhibit 13).

PART III

ISSUES

This claim concerned the purchase of a large tract of land in southern Ontario, including the land upon which the City of Toronto is located, which was acquired by the British Crown as a result of two separate transactions. The first transaction, evidenced only by a blank deed, took place in 1787. The second transaction, acknowledged as a valid treaty for the purpose of this inquiry, took place in 1805. The following is a more detailed summary of the issues as they were developed by the parties throughout the planning conferences:

1 Was the transaction that took place in 1787 valid as a surrender?

2 Did the Crown breach its fiduciary duty to the Mississaugas to fully explain the circumstances of the 1805 treaty prior to its execution, and in particular:

   (a) Did the Crown disclose to the Mississaugas that the 1787 surrender was invalid, as its own senior officials, among themselves, had stated on many occasions?

   (b) Did the Crown fail to disclose to the Mississaugas that the 1805 Toronto Purchase covered a much greater area than the 1787 transaction?

   (c) Did the Mississaugas believe that the Toronto Islands were a part of the purchase, or did they believe that the islands were specifically excluded?

PART IV

CONCLUSION

On July 23, 2002, Robert D. Nault, Minister of Indian Affairs and Northern Development, informed Chief Bryan LaForme of the Mississaugas of the New Credit First Nation, that Canada was willing to accept for negotiation the specific claim known as the Toronto Purchase. For the purpose of negotiation, Canada accepted that the circumstances surrounding the 1805 surrender constituted a breach of lawful obligation on the basis that a treaty or agreement between the Indians and the Crown had not been fulfilled. Canada has not accepted that a lawful obligation exists as a result of a breach of fiduciary duty.

In light of Canada's offer to accept the claim for negotiation under the Specific Claims Policy, the Commission has suspended its inquiry and wishes the parties well in their negotiations towards a settlement.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde

Daniel J. Bellegarde
Commissioner

Dated this 17th day of June, 2003.

APPENDIX A

MISSISSAUGAS OF THE NEW CREDIT FIRST NATION INQUIRY
TORONTO PURCHASE CLAIM

1	**Planning conferences**	July 16, 1998 October 1, 1998 November 25, 1998 February 8, 1999 April 13, 1999 June 10, 1999 July 27, 1999 September 14, 1999 October 19, 1999 December 20, 1999

2 Content of formal record

The formal record for the Mississaugas of the New Credit First Nation Inquiry – Toronto Purchase Claim consists of the following materials:

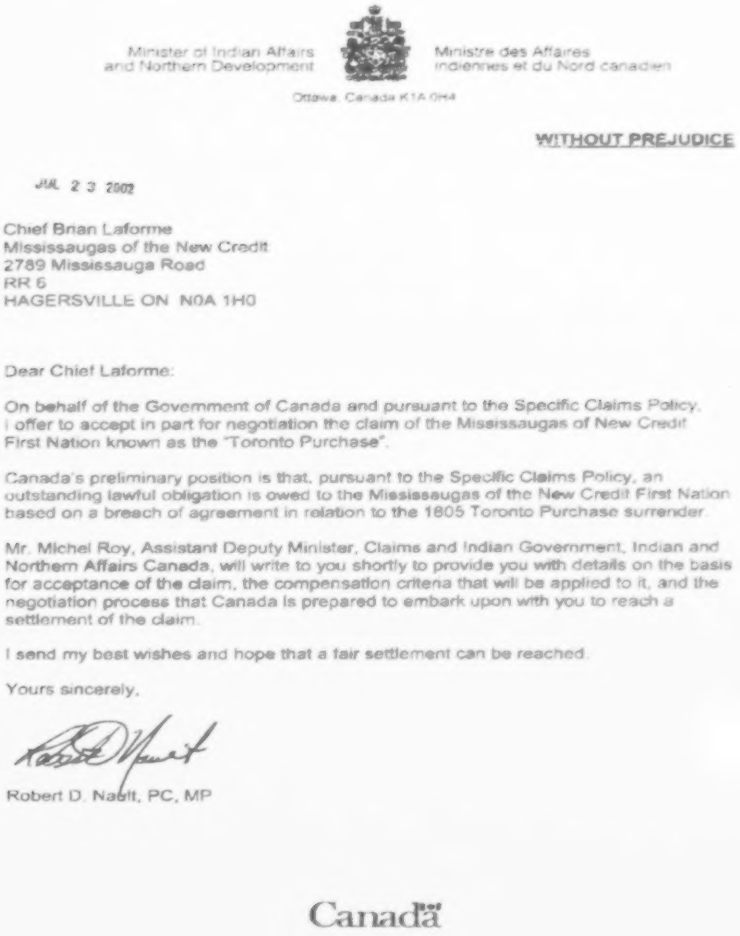
- the documentary record (1 volume of documents, with annotated index) (Exhibit 1)

- Exhibits 1a to 15 tendered during the inquiry

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX B

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

WITHOUT PREJUDICE

JUL 2 3 2002

Chief Brian Laforme
Mississaugas of the New Credit
2789 Mississauga Road
RR 6
HAGERSVILLE ON N0A 1H0

Dear Chief Laforme:

On behalf of the Government of Canada and pursuant to the Specific Claims Policy, I offer to accept in part for negotiation the claim of the Mississaugas of New Credit First Nation known as the "Toronto Purchase".

Canada's preliminary position is that, pursuant to the Specific Claims Policy, an outstanding lawful obligation is owed to the Mississaugas of the New Credit First Nation based on a breach of agreement in relation to the 1805 Toronto Purchase surrender.

Mr. Michel Roy, Assistant Deputy Minister, Claims and Indian Government, Indian and Northern Affairs Canada, will write to you shortly to provide you with details on the basis for acceptance of the claim, the compensation criteria that will be applied to it, and the negotiation process that Canada is prepared to embark upon with you to reach a settlement of the claim.

I send my best wishes and hope that a fair settlement can be reached.

Yours sincerely,

Robert D. Nault, PC, MP

Canada

INDIAN CLAIMS COMMISSION

CANUPAWAKPA DAKOTA FIRST NATION INQUIRY
TURTLE MOUNTAIN SURRENDER CLAIM

PANEL

Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Sheila G. Purdy

COUNSEL

For the Canupawakpa Dakota First Nation
Paul Forsyth

For the Government of Canada
Uzma Ihsanullah

To the Indian Claims Commission
Kathleen N. Lickers / Candice Metallic

JULY 2003

CONTENTS

PART I ***INTRODUCTION*** 267
Overview of the Claim 267
Mandate of the Commission 268
Map 1: Claim Area Map 270

PART II ***HISTORICAL BACKGROUND*** 271
Creation of the Dakota Reserves in Southern Manitoba 271
  Settlement in the Northwest 271
  Dakota Requests for Reserves 272
  Establishment of the Reserve at Turtle Mountain 277
  Map 2: Subdivision Survey of IR 60 at Turtle Mountain 280
Prelude to the Surrender 281
  Relocation Strategy Revisited 281
  Band Member Relocation of 1898 284
  Band Member Relocation of 1908 287
Surrender of the Turtle Mountain Reserve, 1909 292
  Distribution of Proceeds from the Sale of Turtle Mountain IR 60 296

PART III ***ISSUES*** 301

PART IV ***ANALYSIS*** 303
Issue 1: Validity of the Reserve and Its Surrender 304
Issue 2: Does the Surrender of 1909 Accord with the *Indian Act* of 1906? 305
  Issue 2(a): Was Bogaga Entitled to Vote at a Meeting of Council? 305
    Did Bogaga Habitually Reside on or near the Reserve? 306
    Was Bogaga Interested in the Reserve? 320
  Issue 2(b): Was the Band's Assent to the Surrender Properly Certified? 321
  Issue 2(c): Is the Surrender Invalid? 329

Issues 3–5: Does Canada Have an Outstanding Lawful Obligation to the First Nation? 329
  The *Guerin* Case 330
  The *Apsassin* Case 331
  The Context of the Surrender: Inadequate Understanding 333
  Abnegation of Decision-Making Power 336
  Tainted Dealings and/or an Exploitative Bargain 339
Fairness in the Result: Our Supplementary Mandate 346

PART V *CONCLUSION AND RECOMMENDATION* 348

APPENDIX

A Canupawakpa Dakota First Nation Inquiry – Turtle Mountain Surrender Claim 350

PART I

INTRODUCTION

OVERVIEW OF THE CLAIM

During the early 1860s, U.S. governmental policy led many Dakota First Nations to cross the international border into Canada and settle into the northern extremities of their traditional territory. The Dakota people had long held an allegiance to the British and, after a bitter conflict with the Americans, they began to travel northward. In 1862, a Dakota band under Chief Hdamani[1] moved north from Minnesota and occupied a site on the northwest slope of Turtle Mountain, 100 kilometres southwest of Brandon, Manitoba.

Beginning in the 1870s, the Canadian government sought to extinguish aboriginal title to the Canadian northwest by entering into numbered treaties with the native people who lived there. The Dakota, classified by the government as "American Indians," did not participate in the treaty process. In 1873, special provisions for the Dakota were passed by Order in Council that set aside reserve land on the basis of 80 acres per family, subject to increase if warranted by population growth. By mid-decade, three reserves had been surveyed in Manitoba for various Dakota bands: Birdtail Creek Indian Reserve (IR) 57 and Oak River IR 58 in 1875 and Oak Lake IR 59 in 1877. Hdamani and his followers wished to remain at Turtle Mountain, however, and did not relocate to the newly created reserves. In 1886, the government relented to Hdamani's demands and surveyed a reserve at Turtle Mountain (IR 60), though it was not confirmed by Order in Council until 1913. Officials of the Department of Indian Affairs (the department) felt that the location of the reserve at Turtle Mountain was too near the U.S. border and too far from the supervision of the Indian Agent to make it a stable reserve. Over the next 20 years, the department encouraged Turtle Mountain band members to relocate to other reserves. By 1909, the department had determined that only three families remained at Turtle Mountain, and it persuaded these band members to have a surrender vote. The vote to surrender the entire reserve was put before the five eligible voters identified by the department on August 6, 1909, and resulted in a 3 to 2 count in favour of the surrender.

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[1] The Chief's name has many different spellings, including Aahdamane, the form the Chief himself used. In its original claim submission, the First Nation used the form Hdamani, and in its written submission, the First Nation's counsel used H'damani. We will refer to the Chief as Hdamani throughout this report.

On April 20, 1993, the Oak Lake Sioux First Nation (now known as the Canupawakpa Dakota First Nation), on behalf of the descendants of Turtle Mountain IR 60, maintained that the surrender vote was improperly taken and submitted its claim to Specific Claims West of the Department of Indian Affairs and Northern Development (DIAND). On completing its own research and review, Specific Claims West informed the Oak Lake Sioux First Nation by letter dated January 23, 1995, that Canada had no outstanding lawful obligation under the Specific Claims Policy. On May 11, 2000, the Canupawakpa Dakota First Nation requested the ICC to undertake a review of and hold an inquiry into the 1909 Turtle Mountain IR 60 surrender. On January 10, 2001, the Sioux Valley Dakota First Nation (formerly known as the Oak River First Nation) requested that it be allowed to participate in the ICC inquiry because some of its present-day band members could trace their ancestry back to the former members of the Turtle Mountain Band. During a planning conference on February 15, 2001, the parties (the Canupawakpa Dakota First Nation and Canada) agreed to the Sioux Valley Dakota First Nation's participation as an interested and necessary participant to the inquiry. This agreement was confirmed in a letter to Michelle Pelletier, Research Funding Division, DIAND, on March 2, 2001.[2]

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission (the Commission) is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[3] This Policy, outlined in DIAND's 1982 booklet entitled *Outstanding Business: A*

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[2] Kathleen N. Lickers, Commission Counsel, Indian Claims Commission, to Michelle Pelletier, DIAND, Research Funding Division, March 2, 2001 (ICC file 2106-13-01, vol. 1).

[3] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

Native Claims Policy – Specific Claims, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[4] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[5]

The Commission has been asked to inquire into and report on whether the Canupawakpa Dakota First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendation on the merits of this claim.

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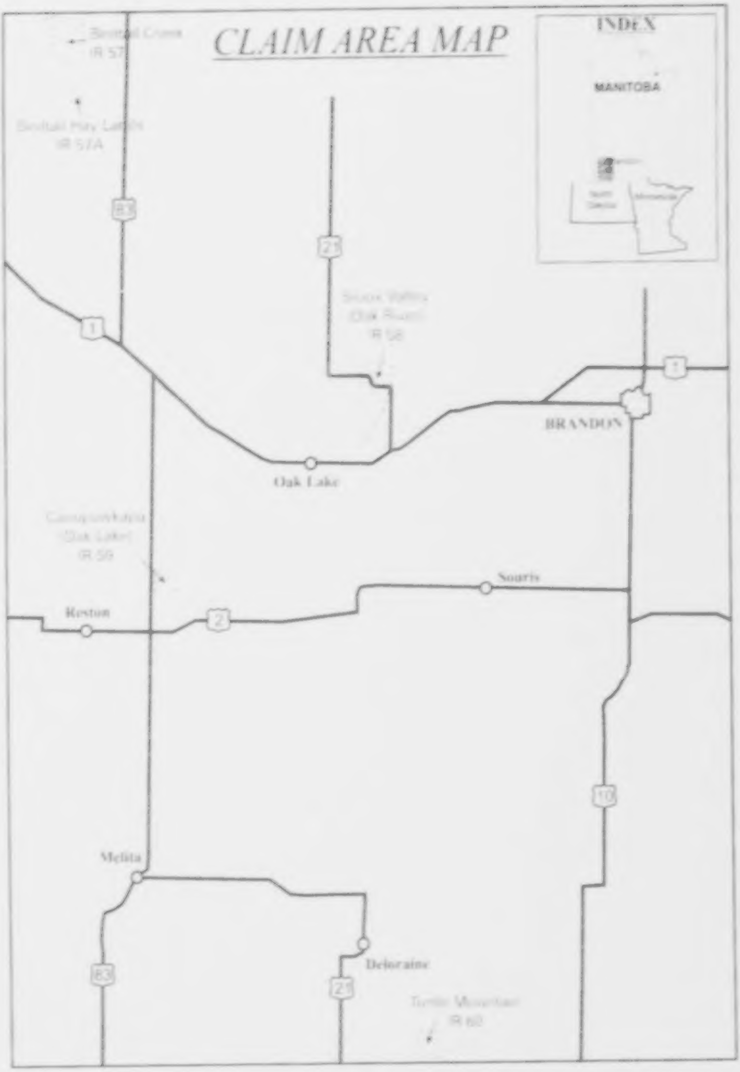
[4] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

[5] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171 at 179–80.


CLAIM AREA MAP
INDEX
MANITOBA
Birdtail Creek
IR 57
Birdtail Hay Lands
IR 57A
83
21
1
Sioux Valley
(Oak River)
IR 58
1
BRANDON
Oak Lake
Canupawakpa
(Oak Lake)
IR 59
Souris
Reston
2
10
Melita
Deloraine
83
21
Turtle Mountain
IR 60

PART II

HISTORICAL BACKGROUND

CREATION OF THE DAKOTA RESERVES IN SOUTHERN MANITOBA

Settlement in the Northwest

During the 1850s and 1860s, the United States was embroiled in violent struggles with the Dakota in the American Midwest. The Dakota had signed a series of treaties with the U.S. government which involved, among other things, land cessions in exchange for residence on reservations. Perceiving that the treaty promises were not fulfilled, some Dakota declared war on the United States in 1862. After a few months' conflict, the American authorities executed 38 Dakota chiefs.[6] During this uprising, small groups of Sisseton and Wahpeton Dakota, some led by Chief Hdamani, fled the United States and made their way to the Turtle Mountain region of what is today southern Manitoba.

Once settled in the Turtle Mountain area, the Dakota asked the Hudson's Bay Company authorities in the Red River settlement at Fort Garry for refuge and protection, and they claimed a right to be on British soil.[7] They spoke of their tribal history, which described how they had collaborated with the British against their enemies. King George III had assured them that, because they had allied with the British in the War of 1812, their culture and freedom would always be respected and honoured wherever British rule prevailed.[8] Shortly after the cessation of hostilities, they said, the Dakota had received medals and flags from the British as a token of this alliance.

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[6] In fact, relations between the Americans and the Dakota were so volatile that there was an "uprising" in Acton, Minnesota, in September 1862. Many Dakota people fled the Midwest soon thereafter, and for good reason: the Governor had pronounced his intention to "eliminate" every Dakota person in the territory. Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988) (ICC Exhibit 11, p. 20).

[7] Gontran Laviolette, *The Sioux Indians in Canada* (Regina: The Marian Press, 1944), 47–51.

[8] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 17 (ICC Exhibit 11, p. 16).

The Dakota lived by hunting, fishing, and trapping and engaged in limited agricultural pursuits. In the summer months, they frequented the Hudson's Bay Company post at Fort Ellice to trade their furs and prepare for the fall and winter hunts.[9]

By the early 1870s, there was rapid social and political change in Manitoba and the North-West Territories. The Hudson's Bay Company transferred responsibility for government and the administration of laws to the Canadian government, lands were surveyed and opened for settlement, and treaties were negotiated with Canadian Indians on the Prairies.[10]

Dakota Requests for Reserves

By the mid-1870s, nearly two thousand Dakota resided in western Canada. Some 200 lived in five camps near Portage la Prairie. Further west there were 200 people on the Assiniboine River, 500 at Oak Lake, and 155 near Fort Ellice. Hdamani had 125 Dakota with him at Turtle Mountain, and there were about 340 Dakota in the vicinity of Fort Qu'Appelle and 260 on the North Saskatchewan River.[11]

The migration of the Dakota over the previous decade presented a problem for the Canadian government. The government held it was not bound to enter into treaty land negotiations because the Dakota, as "American Indians," had no property rights to extinguish.[12] On February 6, 1872, William Spragge, Deputy Superintendent General of Indian Affairs, wrote to Joseph Howe, Secretary of State for the Provinces, and compared the situation of the Dakota to that of the newly arrived immigrants taking up homesteads in the west. Based on his research of the contemporary documentation, historian Peter Elias has described the situation of the Dakota as follows:

> Spragge reported that six hundred Dakota had claimed consideration from the Crown, saying that their ancestors had been faithful allies, and producing four or five King George III medals as proof. While supporting the idea of a reserve, Spragge dismissed their claim of rights, and wrote that the Dakota, "having no territorial rights apper-

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[9] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 33–34 (ICC Exhibit 11, pp. 32–33); Gontran Laviolette, *The Sioux Indians in Canada* (Winnipeg: DLM Productions, 1991), 159.

[10] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 34 (ICC Exhibit 11, p. 33).

[11] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 37 (ICC Exhibit 11, p. 35).

[12] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 38 (ICC Exhibit 11, p. 36).

> taining to the territory, it is to the goodwill of the Government towards them that they must look for such appropriations of land as may be set apart for their benefit."[13]

Spragge suggested that, because the Dakota had been supported in the past, the historical relationship should be considered in constructing the current relationship. He also reported that the Dakota were "a well disposed class of Indians" and recommended that a reserve be set aside. Lieutenant Governor Adams George Archibald of Manitoba endorsed this proposal.[14]

On January 4, 1873, on the basis of Spragge's recommendation, Order in Council 761A-1128 was passed. It provided 80 acres for each family but noted that some land was not suitable for farming. As a result, the total land allocated was to be "about 12,000 acres with the understanding that an additional quantity will be reserved should their actual numbers require it."[15] The location of the reserve caused some concern, for officials felt it was both bad policy and inhumane to settle people who had fled from the United States too close to the international boundary. As a result, the Order in Council stated that "the precise locality west of Manitoba should be left open for future arrangements."[16]

At the same time that the Order in Council was passed, the joint (British and American) International Boundary Commission (headed by Captain D.R. Cameron on Britain's behalf) was surveying the 49th parallel. When Cameron reached Manitoba early in 1873, he met with various indigenous groups as the surveyors progressed westward. In February 1873, Aahdamane (Hdamani) wrote to the Commission acknowledging that he had received supplies from it:

> I wish to you to send to me one thing more. I want you to procure me a Spencer Rifle. I should be glad to get one as I am getting slow and old but with one of those can kill Moose and Red Deer yet. I send you this letter and start to gather fur.[17]

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[13] William Spragge, Deputy Superintendent General, to Joseph Howe, Secretary of State for the Provinces, February 6, 1872, as quoted in Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 38 (ICC Exhibit 11, p. 36).

[14] William Spragge, Deputy Superintendent General, to Joseph Howe, Secretary of State for the Provinces, February 6, 1872, as quoted in Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 39 (ICC Exhibit 11, p. 37).

[15] Canada, Order in Council PC 761A-1128, National Archives of Canada (NA), RG 2, series 1, vol. 72 (ICC Documents, Exhibit 1, p. 6).

[16] Canada, Order in Council PC 761A-1128, NA, RG 2, series 1, vol. 72 (ICC Documents, Exhibit 1, p. 7).

[17] Aahdamane (Hdamani) to D.R. Cameron, International Boundary Commission, February 15, 1873, NA, FO 302/3, reel B-5320 (ICC Exhibit 12, p. 21).

By June 1873, the Boundary Commission had established a trading post at Turtle Mountain under the direction of George Hill. Cameron reported that the Dakota residing in the Turtle Mountain area had requested the Boundary Commission to ask the Queen for a reserve at Oak Lake for themselves.[18] In January 1874, Hill forwarded a second request, this one from Hdamani:

> I, Aahdamane a Dahkotah of the Macha Low Band[19] desire to have the Grant of Land from the Queen which is to be given to each of us in the Turtle Mountain, in a part where you think the land is good. I speak for myself and my three sons. We have been in this place for twelve years. I saw the Ojibeway [sic] here and gave him four horses and five sacred pipes. The Chief Warrior of the Ojibeway gave the Turtle Mountain to me and my people. I want some land from the Queen for myself and my three sons and at present know not where they intend to send us.
>
> If you will let what I say be known and tell me what they say I would be very grateful.[20]

Hill also forwarded to Cameron a request by another Dakota resident at Turtle Mountain, Bogaga, for implements and seed.[21] Bogaga's role in the eventual surrender of the reserve forms an important issue in this claim.

Hdamani's request for a reserve was acknowledged by the Minister of the Interior in a reply to Cameron:

> The Minister desires me to say that he is gratified to learn from your letter of the friendly feeling evinced to your Surveying party by the Sioux during your operations last year, and that he trusts you will continue to cultivate (as you have hitherto done) friendly relations with all the Indian Tribes with whom your party may come in contact.
>
> I have further to request you to cause Mr. Hill to assure the Indian, Aahdamane, that the Government propose to deal liberally and justly with the Indians in the North West.[22]

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[18] D.R. Cameron, International Boundary Commission, to unknown recipient, November 29, 1873, NA, FO 302/8, 165 (ICC Exhibit 12, p. 39). It should be noted that Commissioner Cameron said that the Turtle Mountain people conversed freely in English with him *through their spokesperson*.

[19] Elias writes in *The Dakota of the Northwest: Lessons for Survival* that Hdamani and his family belonged to the Blue Earth (*ma-k'a'to*) tribe, a part of the Wahpetonwon branch of the Dakota Nation (ICC Exhibit 11, p. 40).

[20] Aahdamane (Hdamani) to D.R. Cameron, International Boundary Commission, January 24, 1874, NA, FO 302/8, reel B-5324, 79 (ICC Exhibit 12, p. 50); also RG 10, vol. 3607, file 2988 (ICC Documents, Exhibit 1, pp. 12–13).

[21] Bogaga to D.R. Cameron, International Boundary Commission, February 17, 1874, NA, FO 302/3, 106 (ICC Exhibit 12, p. 55).

[22] E.A. Meredith, Minister of the Interior, to D.R. Cameron, International Boundary Commission, February 26, 1874, NA, FO 302/3, reel B-5328, 1005–06 (ICC Exhibit 12, pp. 59–60).

In March 1874, Cameron asked Hill to identify and gather information about the Sioux residing at Turtle Mountain.[23] He wanted to ensure that the Sioux understood that the Boundary Commission had no authority to enter into treaties with Indian nations. In his reply, Hill explained that, in the winter of 1873–74, two separate groups of Dakota were living at Turtle Mountain:

> Your letter per Mr. Crompton received some time ago. The Sioux continue asking whether the Government is likely to treat with them in time to plant or not. I am of course unable to answer them thirty six souls in all lived in the Mountain last winter – they occupied seven Tents of these five Tents belonged to the Mocaw Low (Blue earth) Band and two to the Waughpaton Band (Green leaf Band).
>
> Of the former "Ahadamane" is the leader though not a chief or even a warrior, he owes his position to the numerous relatives he has among his band and to his natural shrewdness, although honest enough he is extremely jealous & unctuous, he represents the twenty one Tents of his Band in this country.
>
> Of the other two Tents "Waopeah" is the principal man he is an hereditary Chief & represents upwards of one hundred tents of the Waughpatoan Issate & Biddawocanton Bands in this Country. Most of his people live at the portage.[24]

Hill also noted that Turtle Mountain was not occupied permanently, although the Mocha Low Band frequented Turtle Mountain more than any other band and wanted recognition of the fur-rich land for themselves. Although they lived as one people, he wrote that each family desired a separate grant of land. Most important, he noted that they were not a sedentary people.[25] A reserve at Turtle Mountain would enable Hdamani and his followers to pursue their traditional activities of hunting, fishing, and trapping as the basis for their survival in addition to developing a subsistence farming economy.

Order in Council 1104A-1381 was passed on November 12, 1874, authorizing the establishment of two or three reserves for the benefit of the Dakota.[26] The size of the reserves was to be based on an estimate of 80 acres per family of five people. Hdamani wrote to Cameron in December of that year, again asking for a grant of land, oxen, and a plough for his band:

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[23] Unknown author (probably D.R. Cameron) to George Hill, c. March 1874, NA, FO 302/3, reel B-5320, 564–67 (ICC Exhibit 12, pp. 61–64).

[24] George Hill to D.R. Cameron, International Boundary Commission, May 18, 1874, NA, FO 5/1669, reel B-1153, 268 (ICC Exhibit 12, p. 69).

[25] George Hill to D.R. Cameron, International Boundary Commission, May 18, 1874, NA, FO 5/1669, reel B-1153, 268a (ICC Exhibit 12, p. 70).

[26] Canada, Order in Council 1104A-1381, NA, RG 2, series 1, vol. 101 (ICC Documents, Exhibit 1, pp. 21–22).

> In the Summer I saw you I wish the Turtle Mountain to be mine and plainly marked out for a Grant.
>
> The Little Saskatchewan is Wahuniste Scahs own (the Wanghpatoan) [Wahpeton]. At Beaver Creek Sisseton also Wanghpatoans have ground. The Mocha Low Band want the Turtle Mountain to plant in. The place is good for fur therefore I am anxious for it. I would like you to tell the Governor to give us this for our Grant with oxen and a plow.[27]

Lieutenant Governor Alexander Morris refused Hdamani's request and insisted that the Turtle Mountain Dakota move to Oak River, where "the Sioux can be induced to combine growing crops, with the pursuit of game, fur-bearing animals and fishing, and eventually, to adopt the habits of civilization."[28] Elias contends that the Turtle Mountain Dakota wanted the Turtle Mountain reserve so they could continue hunting, fishing, and trapping and using the land for winter housing and gardens.[29] Oak River IR 58 was surveyed in the spring of 1875 and, later in the summer, Surveyor William Wagner finished surveying Birdtail Creek IR 57.[30]

In February 1877, Morris wrote to the Minister of the Interior stating that a small band of Dakota (about 20 families wintering there) were living on Turtle Mountain. They wished to be "allowed to settle" on a reserve there.[31] Initially, J. Provencher, the Acting Indian Superintendent, refused to consider any reserve located close to the border, viewing it as both hazardous and expensive.[32] However, after Hdamani visited Morris during the summer, Morris recommended that a reserve be set aside for the Dakota, including the Indians of Turtle Mountain, at Oak Lake.[33] Morris wrote that Oak Lake would be "a suitable place for them and am unaware of the objections to granting them a Reserve there which influence you. They have made the

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[27] Aahdamane (Hdamani) to D.R. Cameron, International Boundary Commission, December 21, 1874, NA, FO 230/3, reel B-5320 (ICC Exhibit 12, p. 79).

[28] Alexander Morris, Lieutenant Governor, to David Laird, July 14, 1875, as quoted in Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 50 (ICC Exhibit 11, p. 48).

[29] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 52 (ICC Exhibit 11, p. 50).

[30] Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988), 49 (ICC Exhibit 11, p. 47).

[31] Alexander Morris, Lieutenant Governor, to Minister of the Interior, February 26, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 23–26).

[32] J. Provencher, Acting Indian Superintendent, to Minister of the Interior, May 4, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 33–36).

[33] Alexander Morris, Lieutenant Governor, to Minister of the Interior, June 16, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 47–48). It should be noted that the Turtle Mountain Dakota, led by Hdamani, brought an interpreter for their discussion with Morris.

Turtle Mountain their home so long, that it will be difficult to induce them to move far from it."[54]

On November 9, 1877, an Order in Council was passed authorizing a reserve to be set apart for the Dakota at Oak Lake (IR 59), allowing them the same quantity of land (80 acres per family of five) as was assigned at the Oak River and Birdtail Creek reserves.[55]

Hdamani and his followers continued to live at Turtle Mountain and were not included with the Dakota bands that received the three reserves (Birdtail Creek IR 57, Oak River IR 58, Oak Lake IR 59). Hdamani's band continued to petition the government for its own reserve at Turtle Mountain,[56] and Indian Affairs personnel also discussed the creation of a Turtle Mountain reserve. In August 1878, however, Acting Indian Superintendent James F. Graham informed the Department of the Interior that no reserve would be laid out at Turtle Mountain that summer.[57]

Establishment of the Reserve at Turtle Mountain

On February 15, 1881, Hdamani wrote to G.F. Newcombe, Dominion Lands Agent in the Turtle Mountain area, complaining that settlers had been cutting timber on lands that the Chief considered belonged to him.[58] In the summer of that year, however, Indian Agent L.W. Herchmer wrote to Assistant Indian Commissioner E.T. Galt and stated that there had been no disturbances and that no trouble was anticipated. He also noted that Ka-dat-money (Hdamani) "thoroughly understands his position, and has been ordered to go to Oak Lake if he wants to farm with good assistance."[59]

The following year, a local settler, James Spiers, wrote to the Land Commissioner of the Canadian Pacific Railway that a group of Dakota had forced him to vacate the area where he had pitched his tent (section 19, township 10, range 24, west of the 1st meridian) because he was encroaching on their lands. "Those Indians belong to a Sioux Reserve about ten miles east," he wrote, "but they claim to own the land along the river west for ten miles."[40] When Herchmer went to Turtle Mountain to investigate the claims of the settlers, he found that the Dakota he encountered were well thought of by local settlers and that they had established their agricultural economy and community quite successfully. The fault, he determined, lay with the settlers who were taking timber without permit or licence. Moreover, he wrote:

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[54] Alexander Morris, Lieutenant Governor, to Minister of the Interior, June 16, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 47–48).

[55] Canada, Order in Council 1506A-977, NA, RG 2, series 1, vol. 151, November 9, 1877 (ICC Documents, Exhibit 1, pp. 63–70).

[56] Alexander Morris, Lieutenant Governor, to Minister of the Interior, October 25, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 59–60).

[57] James F. Graham, Acting Indian Superintendent, Manitoba Superintendency, to Minister of the Interior, August 8, 1878, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 79–80).

[58] Hdamani to G. Newcombe, Dominion Lands Agent, February 15, 1881, NA, RG 10, vol. 3751, file 30004 (ICC Documents, Exhibit 1, p. 82).

[59] L.W. Herchmer, Indian Agent, to E.T. Galt, Assistant Commissioner, August 14, 1881, NA, RG 10, vol. 3751, file 30004 (ICC Documents, Exhibit 1, p. 86).

> During the troubles on the American side lately between Indians and Halfbreeds on the one side and Settlers on the other, these Sioux have kept strictly neutral, they receive no assistance from the Government and have purchased their own plows, harrows etc. I have the honor to suggest that during good behavior they may be allowed to occupy Sec. 31, T. 1 R. 22 W., and that I may be permitted to lend them a yoke of government oxen.[41]

On November 24, 1882, A.M. Burgess, Secretary in the Department of the Interior, wrote to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, stating that "these Indians should not be disturbed, so long as they behave themselves in an orderly and law abiding manner."[42] Marginalia on the same document written by an unidentified person stated:

> Mr. McNeill – Inform Mr. Dewdney of this decision & request him to cause the Indians to be informed of the condition on which they will be permitted to remain on the land. Also to authorize Agent Herchmer to lend them a yoke of oxen in the ensuing Spring as suggested by him if they are quite unable to purchase or hire for themselves.[43]

As Hdamani and his followers occupied their land at Turtle Mountain with the blessing of the Department of Indian Affairs, they progressed quickly with their agricultural pursuits, even though no official survey or setting aside of reserve lands had occurred. By 1883, Indian Agent Herchmer wrote, "[T]he small band at Turtle Mountain, under Ka-da-mo-ree, now that they have a reserve and are getting cattle, will do well."[44] The following year, he noted that the Dakota people were making strides in their development of an agrarian economy and a community, and that the location of the land also enabled them to continue hunting and fishing successfully.[45]

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[40] James Spiers to J.H. McTavish, CPR Land Commissioner, June 19, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 87).

[41] L.W. Herchmer, Indian Agent, to Commissioner of Indian Affairs, September 2, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 91).

[42] A.M. Burgess, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 24, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 92).

[43] A.M. Burgess, Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, November 24, 1882, NA, RG 10, vol. 3608, file 3030 (ICC Documents, Exhibit 1, p. 92).

[44] L.W. Herchmer, Indian Agent, to Superintendent General of Indian Affairs, June 30, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883*, 65 (ICC Documents, Exhibit 1, p. 95).

Late in 1885 Indian Commissioner E. Dewdney recommended that the Turtle Mountain reserve be subdivided[46] and, in July 1886, Surveyor A.W. Ponton proceeded to survey a whole section of land, 640 acres, at Turtle Mountain for Hdamani and his followers.[47] Ponton subdivided the reserve into eight equal lots and identified land holdings on the reserve. His survey plan and field book, reproduced on page 280, identified eight different families with nine separate land holdings:

Ta-cah-pi-waśte-śte (Pretty Club) (2 separate parcels of land)
Boğağa
Mazawakan (Shot Gun)
Oye-Duta (Red Track)
Sunkaska (Lone Dog)
Chef Hda-mani (Walking Bell)
Mazadi-oi-win
Winona[48]

Ponton submitted his survey report to John C. Nelson, the official in charge of Indian reserve surveys, on December 21, 1886. In it, he found the Turtle Mountain people in possession of section 31, township 1, range 22, west of the 1st meridian.[49]

A letter written in March 1887 by P.B. Douglas, Assistant Secretary of the Department of Indian Affairs, to the Surveyor General indicates that the department intended to constitute the land surveyed by Ponton as an Indian reserve:

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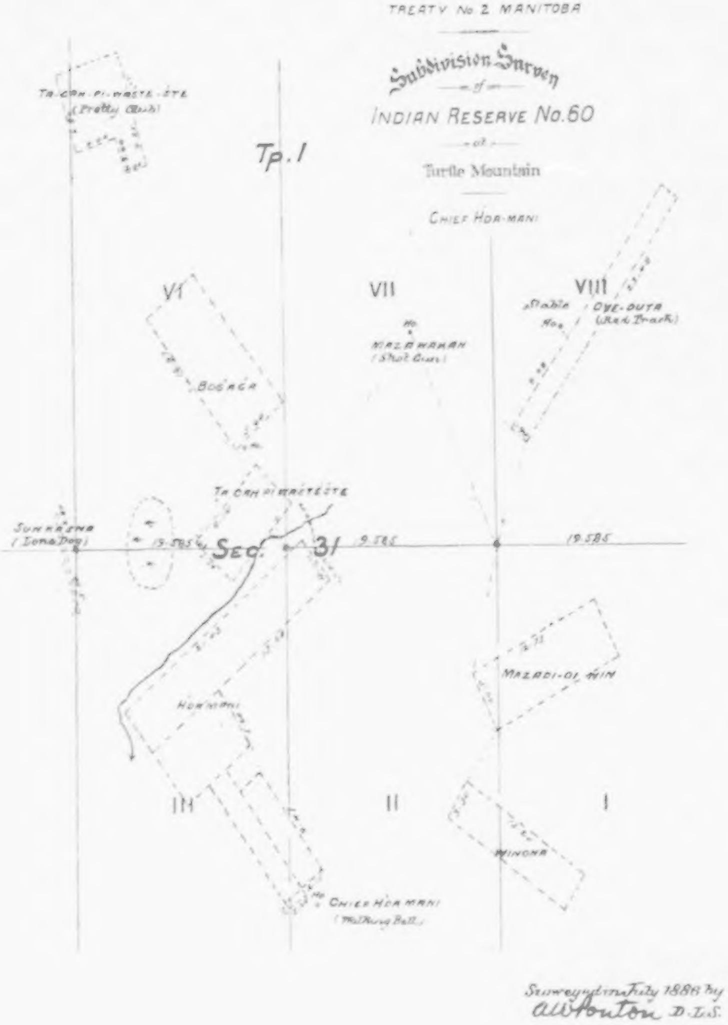
[45] L.W. Herchmer, Indian Agent, to Superintendent General of Indian Affairs, July 26, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, 70 (ICC Documents, Exhibit 1, p. 97). In this correspondence, Herchmer noted that the Turtle Mountain Dakota had broken 35 acres and that they were building "excellent houses."

[46] E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, December 30, 1885, NA, RG 10, vol. 3728, file 25715 (ICC Documents, Exhibit 1, p. 99).

[47] Canada Lands Surveys Records (CLSR) Plan T277, *Treaty No. 2 Manitoba Subdivision Survey of Indian Reserve No. 60 at Turtle Mountain – Chief Hdamani*, July 1886, Natural Resources Canada (ICC Exhibit 7).

[48] CLSR Plan T277, *Treaty No. 2 Manitoba Subdivision Survey of Indian Reserve No. 60 at Turtle Mountain – Chief Hdamani*, July 1886, Natural Resources Canada (ICC Exhibit 7), and Field Book 29, *Treaty No. 2 N.W.T., Field Notes No. 60 Turtle Mountain*, July 1886, Natural Resources Canada (ICC Exhibit 8).

[49] A.W. Ponton, Surveyor, Indian Reserve Surveys, to John C. Nelson, In Charge, Indian Reserve Surveys, December 21, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1886*, 181–83 (ICC Documents, Exhibit 1, pp. 111–13). Ponton also found that the Turtle Mountain Dakota people were "industrious," "making progress," and had been on the land for over 20 years.


TREATY No 2 MANITOBA
Subdivision Survey
of
INDIAN RESERVE No.60
at
Turtle Mountain
CHIEF HOR-MANI
Tp. 1
TA-CAN-PI-WASTE-STE
(Pretty Club)
VI
VII
VIII
BOS'AGA
Ho
MAZA WAKAN
(Shot Gun)
Stable
Hou
OYE-DUTA
(Red Track)
TA CAN PI WASTE STE
SUN KA'SNA
(Lone Dog)
19.585
SEC. 31
9.585
19.585
HOR'MANI
MAZADI-OI-WIN
III
II
I
WINONA
Ho
CHIEF HOR MANI
(Walking Bell)
Surveyed in July 1888 by
A.W. Ponton D.L.S.

> Some correspondence has taken place between the Deputy Superintendent General of Indian Affairs and this Department with reference to Sec. 31, Township 1, Range 22 West of the 1st Meridian, which it is claimed has been in the possession of the Sioux Indians for a number of years and I am now directed to inform you that it has been decided to constitute that Section an Indian Reserve.[50]

The reserve would not be confirmed by Order in Council, however, until November 21, 1913, four years after the surrender.[51]

PRELUDE TO THE SURRENDER

Relocation Strategy Revisited

Three years after the survey of the Turtle Mountain reserve, in August 1889, the Birtle Indian Agent, J.A. Markle, raised the possibility of relocating the Dakota at Turtle Mountain:

> At Turtle Mountain Reserve No. 60, thirty-eight acres were put under crop, but for want of sufficient rain the grain is light. An attempt was made to induce[52] the Indians of this band to remove to some other reserve, where they would be more under the direct supervision of an official of the Department, as it has been found that the reserve is too near the boundary line, but as yet I have not been able to get them to assent to the request of the Commissioner in this particular.[53]

Markle cited the close proximity of the reserve to the international border and the 100-mile distance from supervision by the Indian Agency office at Birtle as significant reasons for the Dakota not having progressed with agricultural pursuits as he had hoped.[54] The Assistant Indian Commissioner advised him to continue his efforts to convince the Band to relocate:

> Dept. will remember that some 2 years ago it approved the idea of getting the Indians removed if possible to White Bear's Reserve Moose Mtn. where they would be looked after properly. Until now the Agt. has reported himself unable to make any impression

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[50] P.B. Douglas, Assistant Secretary, Department of Indian Affairs, to the Surveyor General, March 24, 1887, NA, RG 88, vol. 299, file 0500-2 (ICC Documents, Exhibit 1, p. 114).

[51] Canada, Order in Council PC 2876, NA, RG 2, series 1, vol. 1276 (ICC Documents, Exhibit 1, pp. 546–49).

[52] The Oxford English Dictionary defines "induce" as "to persuade or to prevail upon." This definition was recorded in 1998 and is likely close in meaning to the term as it was used in the years 1872–1909.

[53] J.A. Markle, Indian Agent, to Superintendent General, August 6, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1889*, 58 (ICC Documents, Exhibit 1, p. 117).

[54] J.A. Markle, Indian Agent, to Indian Commissioner, July 2, 1890, NA, RG 10, vol. 3783, file 40470 (ICC Documents, Exhibit 1, p. 136).

> on them, but was told to persevere as it was felt that through time, they would be got to view the idea more favourably.[55]

By 1891, the limited role of the Indian Agent at Turtle Mountain and the Agent's perceived rationale for this situation had become evident even to local settlers. In April of that year, settler Edward Kerr wrote a letter to Thomas Daly, Minister of the Interior, concerning the nature of the department's interaction with the Dakota of Turtle Mountain. He reported that the Indian Agent was not providing necessary goods or services for the Dakota people. Specifically, he noted, they required seed, implements, and a farming instructor.[56]

Kerr's letter was forwarded to Hayter Reed, the Indian Commissioner at the time. Reed responded to Daly that the "Indians referred to are, as you supposed, refugee Sioux, and consequently anything done for them is a matter of grace and not of right."[57] Reed, concerned about the provision of an Indian Agent to a location far from other agencies, focused his attention on the removal of the Turtle Mountain people to Moose Mountain. Although there is no record of any response from the Department of Indian Affairs to Kerr, Reed followed up his letter of April 21 with another the following day to Indian Agent Markle. Reed instructed Markle to provide seed potatoes to the Band, but to continue his efforts to get the people to relocate to Moose Mountain.[58] Rather than providing seed potatoes as a gift to the Band, however, Markle instructed A.R. Renton, who lived close to the reserve, to sell Hdamani's ox and to purchase 30 bushels of seed potatoes for the Band from the proceeds of that sale.[59]

A report written by T.P. Wadsworth, Inspector of Indian Agencies, on September 7, 1891, reveals that the Oak Lake and Turtle Mountain reserves did not receive any food supplies between September 1890 and September 1891.[60] Wadsworth also reported that the population "of the small band of

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[55] Marginalia notation of A.E. Forget, Assistant Indian Commissioner, in J.A. Markle, Indian Agent, to Indian Commissioner, July 2, 1890, NA, RG 10, vol. 3783, file 40470 (ICC Documents, Exhibit 1, p. 136).

[56] Edward Kerr to Thomas Daly, Minister of the Interior, April 12, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 137–38). Kerr also wrote, significantly, that the Turtle Mountain Dakota "talk good English."

[57] Hayter Reed, Indian Commissioner, to Thomas Daly, Minister of the Interior, April 21, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 139).

[58] Hayter Reed, Indian Commissioner, to J.A. Markle, Indian Agent, April 22, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 141).

[59] J.A. Markle, Indian Agent, to Hayter Reed, Indian Commissioner, April 25, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 143).

[60] T.P. Wadsworth, Inspector of Indian Agencies, to Hayter Reed, Indian Commissioner, September 7, 1891, NA, RG 10, vol. 3859, file 82250-2 (ICC Documents, Exhibit 1, p. 158).

Sioux" at Turtle Mountain for that year numbered 30[61] and that Markle was to be congratulated for keeping in touch with all the Indians in his agency.[62]

In April 1893, Chief Hdamani wrote to the department complaining of unfulfilled promises that had been made when the Dakota initially settled at Turtle Mountain:

> This Chief and a good interpreter [illegible] me to remind the Agent of this District of promises made to them when they settled on the Reserve farming outfit Binder [illegible]farming mill ploughs harrows oxen wagon etc. school and library and church etc. than give reason why they are not allowed to sell their cattle where they like without going to jail. They can get nothing from the Agent Arckir [Markle] is no good. He takes more than he gives and lies besides. Give this memo due consideration & oblige the Chief.[63]

The Indian Commissioner's response to Hdamani's complaint conformed with the department's desire to relocate the Band. The Commissioner advised Chief Hdamani that he was mistaken with respect to his requests and that he would not receive them. He was, again, advised to relocate to the Moose Mountain Agency:

> You are evidently in error as to what promises were made to you by the Agent when you settled on your present Reserve, for those you allege to have been made include things which are not given to Indians ever although they are well behaved and belong to our own Treaties. I very much regret that reports which have been reaching me are not such as to lead one to suppose that anything would be gained by giving you and your band any additional assistance. You knew that in order to have you assisted to farm and so make your own living, I was anxious to have you remove to the Moose Mountain Agency where you could be well looked after, and I hope that you will yet see that it is for the benefit of you all to fall in with that wish of mine, or if you would prefer it you could be settled among the Sioux on the Bird Tail Reserve.
>
> I have always been hoping that you would see the desirability of falling in with our desires [to relocate you to another reserve] in your own interests, and have been very loath to compel you to do so, but I do not see how it will be possible to leave you any

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[61] T.P. Wadsworth, Inspector of Indian Agencies, to Hayter Reed, Indian Commissioner, September 7, 1891, NA, RG 10, vol. 3859, file 82250-2 (ICC Documents, Exhibit 1, p. 178).

[62] T.P. Wadsworth, Inspector of Indian Agencies, to Hayter Reed, Indian Commissioner, September 7, 1891, NA, RG 10, vol. 3859, file 82250-2 (ICC Documents, Exhibit 1, p. 189).

[63] Hdamani to unidentified recipient, c. April 1893, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 195). Agent Markle had been accused before of "fooling" the Dakota. Chief Two Dogs of Deloraine wrote to the Indian Agent of the Moose Mountain Agency to complain that promises made to him and his followers about land had not been kept. Two Dogs to J.J. Campbell, August 25, 1892, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 191–92).

> choice in the matter, unless you and your people entirely discontinue the purchase and use of intoxicants.[64]

The failure to provide agricultural help to the group at Turtle Mountain was one factor, in addition to others, that contributed to stagnant agricultural returns for the Dakota. Indian Agent Markle's annual reports to the department indicate that, in 1894, the Dakota had 15 acres of land under cultivation;[65] in 1895, 16 acres;[66] and in 1896, 7 acres.[67] Markle attributed the lack of progress in agricultural pursuits among the Dakota to the reserve's close proximity to the U.S. border and the influence of "scallawag Indians from both sides of the line."[68]

Band Member Relocation of 1898

According to the *Indian Act* of 1895, the transfer of an Indian from one band to another had to conform with the following procedures:

> 8. The Indian Act is hereby amended by adding the following sections thereto:
>
> 140. When by a majority vote of a band, or the council of a band, and his admission thereinto is assented to by the superintendent general, such Indian shall cease to have any interest in the lands or moneys of the band of which he was formally a member, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his per capita share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid.[69]

The particular circumstances of the 1898 relocation from Turtle Mountain case are listed here for purposes of clarity, as the facts surrounding the relocation are detailed and often convoluted:

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[64] Hayter Reed, Indian Commissioner, to Chief Hdamani, May 30, 1893, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 198–99).

[65] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, July 17, 1894, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1894*, 59 (ICC Documents, Exhibit 1, p. 201).

[66] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, August 5, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895*, 143 (ICC Documents, Exhibit 1, p. 207).

[67] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 145 (ICC Documents, Exhibit 1, p. 219).

[68] J.A. Markle, Indian Agent, to Superintendent General of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 145 (ICC Documents, Exhibit 1, p. 219).

[69] *Indian Act*, SC 1895, c. 35, s. 8(140).

- On March 8, 1898, Indian Agent Markle wrote to the Indian Commissioner that two families living on Turtle Mountain (likely Iyo-jan-jan and Widow Kasto) had agreed to move to the Oak Lake reserve if the Department of Indian Affairs would erect dwellings for them in their new location. Markle also mentioned that during the attempts to relocate the Band to Moose Mountain, a similar "inducement" was authorized by the department.[70]

- On March 22, 1898, J.D. McLean, Secretary of the Department of Indian Affairs, approved the relocation in a letter written to A.E. Forget, Indian Commissioner, stating that the two families would receive $40 each towards the construction of new homes, but that this payment was not to be viewed as a commitment to similar expenditures in the future. He also cautioned that "[c]are should be taken to get formal consent of the Band to which it is proposed to transfer any of these Indians, and also to get a written renunciation of the Indians removed to all title, claim or interest on the Reserve at Turtle Mountain."[71]

- On March 28, 1898, Indian Commissioner Forget approved the payment of $80 and instructed Indian Agent Markle to facilitate the transfer according to the wishes of the department. Markle was specifically instructed to obtain both the consent of the Oak Lake Band for the admission of the Turtle Mountain families and a written renunciation of "all claim, title or interest to or in the Reserve at Turtle Mountain" from those families.[72] Some 12 years later Markle admitted that the formal consent of the Oak Lake Band and the renunciation of the rights to Turtle Mountain by the relocated families were never carried out.[73]

- On May 24, 1898, Markle reported that three families (Iyo-jan-jan, Widow Kasto, and Kibana Hota) had moved from Turtle Mountain to the Oak Lake reserve. He included an additional request from Kibana Hota for a sum of $40 to help in constructing his new home. Widow Kasto also requested the reservation of two small parcels of land at the Turtle Mountain IR 60 site for a burial plot.[74]

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[70] J.A. Markle, Indian Agent, to Indian Commissioner, March 8, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 233–34).

[71] J.D. McLean, Secretary, to A.E. Forget, Indian Commissioner, March 22, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 237).

[72] A.E. Forget, Indian Commissioner, to Indian Agent, Birtle Agency, March 28, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 238).

[73] J.A. Markle, Inspector of Indian Agencies, to J.D. McLean, Secretary, August 29, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 421–22).

Although the department approved the financial consideration for the Iyo-jan-jan and Kasto families in 1898,[75] it refused to allocate $40 for Kibana Hota.[76]

- On June 8, 1898, the Secretary to the Indian Commissioner's office advised Markle that "the wishes of the Indians with regard to the burial plots referred to will, of course, be respected should the reserve be sold."[77]

A second request was made in 1902 by the new Indian Agent, G.H. Wheatley, on behalf of Kibana Hota for remuneration of his expenses to build a new house,[78] but it was not until 1913 that Hota received any consideration from the department.[79]

The relocation of these three families to Oak Lake provided an opportunity for the department to look into the question of surrendering the Turtle Mountain reserve. A letter written by James Campbell, an Indian Affairs official, to the Secretary reiterated the importance of obtaining the consent of the Oak Lake Band for the receipt of Turtle Mountain members. He noted that the area was a rendezvous for American Dakota and that the population of Turtle Mountain, "some 29 souls," did not justify the cost associated with such long trips from the Indian Agency. As well, the issue of the nature of the surrender and the procedure to facilitate it remained at the forefront of the discussion:

> The Commissioner was instructed, however, to be careful to get formal consent of the Band to which it is proposed to transfer them, to receiving them and written renunciation of Indians removing to all title, claim or interest in the Reserve at Turtle Mountain.

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[74] J.A. Markle, Indian Agent, to A.E. Forget, Indian Commissioner, May 24, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 243–44).

[75] J.D. McLean, Secretary, to A.E. Forget, Indian Commissioner, March 22, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 237).

[76] J.D. McLean, Secretary, to J.A. Markle, Indian Agent, September 13, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 262).

[77] Secretary to the Indian Commissioner to Indian Agent, Birtle Agency, June 8, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 247).

[78] G.H. Wheatley, Indian Agent, to Secretary, Department of Indian Affairs, March 25, 1902, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 270).

[79] J.D. McLean, Secretary, to James McDonald, February 8, 1913, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 520–21).

> This is how the matter now stands, but probably before any disposition of the Reserve could be made, that is in the event of all agreeing to remove, a surrender would have to be taken before it could be disposed of, and then the question would have to be considered as to whether it should not be sold for the benefit of the owners, and whether the Band receiving them should not share in such benefit, as a return for adopting them.[80]

Indian Agent Markle suggested that the eastern half of the Turtle Mountain reserve, the area where the three families had previously resided, be disposed of as soon as possible[81] because Chief Hdamani was trying to induce "vagrant American Sioux" to locate on those lands.[82] Markle's suggestion was turned down by the Indian Commissioner's Office, however, since "[t]he ultimate disposal of the reserve can hardly be considered while a portion of the membership of the band continue to reside on it."[83] As well, in June 1898 Markle wrote to the Secretary of Indian Affairs that "there is little ground to hope that they [the Turtle Mountain members] will agree to remove and surrender their claim."[84] Also in that year, the department reminded Markle of the legislative requirements for surrendering Indian reserves.[85]

In 1902, Markle was replaced by Indian Agent G.H. Wheatley, who served at the Birtle Agency until 1906. Although little information remains about the Dakota at Turtle Mountain during Wheatley's tenure, there are reports of American Dakota citizens crossing into Canada and of Canadian Dakota Indians crossing into the United States.[86] In fact, Wheatley submitted the same word-for-word description of the Turtle Mountain reserve for the annual reports of the Department of Indian Affairs in each year of his tenure.

Band Member Relocation of 1908

In 1907, the administration of the Dakota reserves in southern Manitoba was transferred from the Birtle Agency to the Griswold Indian Agency, which was under the direction of a newly appointed Acting Indian Agent, J. Hollies. In his 1907 annual report, Hollies wrote that he visited the Turtle Mountain reserve to investigate charges made by Chief Hdamani that American Indians were visiting the reserve and participating in gambling, drinking, and carousing.[87] Hollies, assisted by the Deloraine Chief of Police, Charles Stevens, identified the resident Indians and found the reserve to be as "quiet as a church." Hollies suggested that Stevens be used as a watchdog, with the authority to expel any trespassers who visited the reserve.[88]

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[80] James Campbell to the Secretary, May 20, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 239–40).

[81] J.A. Markle, Indian Agent, to Indian Commissioner, May 24, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 242–44).

[82] J.A. Markle, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 249).

[83] Secretary to the Indian Commissioner to Indian Agent, Birtle Agency, June 8, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 247).

[84] J.A. Markle, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 249).

[85] J.D. McLean, Secretary, to J.A. Markie, Indian Agent, June 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 251).

[86] David Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, June 21, 1902, NA, RG 10, vol. 3797, file 47554-2 (ICC Documents, Exhibit 1, p. 271).

In January 1908, Hollies, acting on instructions from the Department of Indian Affairs and from Indian Commissioner David Laird, visited Turtle Mountain IR 60 to conduct a census of the Indian residents. Through his interpreter, Hollies determined that 13 families, with a population of 45, were resident on the reserve. He also stated that quarrels were frequent, discord he attributed to Chief Hdamani's demand that he receive the best land. In that same report, Hollies addressed the expense and impracticality of maintaining a reserve at Turtle Mountain. He recommended that four male members of three families be given the right to vote on the surrender of the reserve, even though examination of the census list he compiled reveals that 15 men aged 21 years or older were residing at Turtle Mountain.[89] Subsequent correspondence discloses that an additional male band member, Mahtohkita, was away at the time Hollies completed his census.[90] In the same letter, Hollies wrote as follows:

> #1 Hdamani and Wife, with #2 Bogaga and wife, are too old and feeble to work for a living any more and should I think be provided for as "Old and Destitute"[91] as they belong to this Agency, they could be placed without having lands, on Oak River reserve under the Agent's care.
>
> #3 Sunkanapi is the only remaining voter, that has a say in the "surrender" of the lands of the Reserve. A careful presentation of the advantages he would reap on a large reserve compared with the confined and cramped position he now occupies,

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[87] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 288–89).

[88] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, 28 August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 286).

[89] Two separate and different lists, both written in the same handwriting, have been entered into the document collection. J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2, and NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 298–99).

[90] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, September 21, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 330).

[91] An earlier version of the *Indian Act* included payment to Indian people considered unable to provide for themselves. In 1886, "Aged and Destitute" Indians were part of a discretionary group that the Superintendent General of Indian Affairs could furnish with sufficient aid. *Indian Act* (1886), 43 Vic., c. 28, ss. 1, 74.

> would I think make him willing to request to be transferred to such reserve, more especially if assistance and direction were given to establish him there.[92]

Hollies also determined that "the others have no vote on the 'surrender' but in my opinion should have a share in the funds realized from the sale, applied as the Dept. or yourself may see fit, to establish them in their new home."[93] Adjacent to the previous quotation, the Assistant Commissioner wrote in a marginalia note: "[T]he reasons for this would have to be stated and carefully considered."[94]

The method Hollies used to determine eligible voters was questioned by J.D. McLean, Secretary of the Department of Indian Affairs, on February 21, 1908.[95] In his reply to the department, Hollies stated:

> I beg to state that the copy of the "Census Book" of the Turtle Mountain Reserve at this Agency the original of which is in the office of the Indian Commissioner at Winnipeg, shows only nine people on the reserve in three families. The heads of the families being the first three on the list, in my report for January. All previous reports yearly, or otherwise, show only the same number with the same heads. The remainder on the list, straggled on to the reserve, and have ever been treated by former Agents as stragglers, and ordered away.
>
> However, no action was ever taken to carry the orders into effect, and the stragglers in time became residents, having remained on the reserve, year after year, some for fifteen years.
>
> They never applied for admission to the band. The method of application and gaining admission into the band, as I take it, seems to have been unknown to them, for it was never followed, neither is there any authority to place their names on the band list, for of course, not being reported, nothing was known of them by the Department! They have been severely let alone!
>
> My conclusions were based upon the reasonableness of not giving a vote to Indians who had hitherto, never been received formally into membership of the band, and appeared legally, not entitled to any say, as to surrender of the lands.
>
> But at the same time in equity having become residents, for they now have houses, stables, hay, and some lands they call their own, which some cultivate – It is their home! It is certainly no fault of theirs they are there; It seems to me they should have some share, perhaps not a pro rata share, but a share sufficient to give them a start on a larger reserve and among their own people.

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[92] J. Hollies, Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 296).

[93] J. Hollies, Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 296).

[94] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 296).

[95] J.D. McLean, Secretary, to J. Hollies, Acting Indian Agent, February 21, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 300).

> As to the value of the lands on said Turtle Mountain reserve, I would say about $18.00 per acre. I am of the opinion that if placed upon the market and sold by auction, they would realize that amount.[96]

Hollies' plan of differentiating between those residents who had the right to vote on the question of a surrender and those who were simply a resident on the reserve was approved in a memorandum written by W.A. Orr, In Charge Lands & Timber Branch, to the Deputy Minister. Orr stated that those members who were simply residents of the reserve and not entitled to vote would receive compensation only for their improvements.[97]

The international boundary and the seasonal relocation and casual absences of Turtle Mountain reserve members were all subjects of concern for Agent Hollies. In his July 1908 report, he noted that four families from Turtle Mountain had gone "across the line" when he visited the reserve in June. Hollies also mentioned that when Bogaga, whom he described as "very old," returned from Fort Totten, Hollies would endeavour to persuade him to relocate to the Oak River reserve.[98]

In August 1908, Hollies again visited the Turtle Mountain reserve, where he found that four families, had applied for and been accepted into the Oak Lake Band:

> I have the Honour to state that I have visited The Turtle Mountain Indian Reserve #60, once the latter part of June, and again on the first of August. On the last occasion, #5 on the list forwarded to Department with January Report of Turtle Mountain Indian Reserve #60, Hinhansunna, filled in an Application for admission into Oak Lake Band #59, so did #6, George Nayioza, also Sam Eagle #10, likewise, John Matoita #12. The Applications were dated August 3rd 1908. These I presented To Oak Lake Band #59 on the 8th of August. The Band accepted and granted the petition of each one. The forms of petition and Acceptance I am forwarding in the usual way to the Indian Commissioner at Winnipeg. I might add that Oak Lake Band, prior to my visit was fully aware of what had taken place on the Turtle Mountain Reserve, and knew the purport of my visit on this occasion to Oak Lake Band #59.[99]

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[96] J. Hollies, Acting Indian Agent, to J.D. McLean, Secretary, March 7, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 301–2).

[97] W.A. Orr, In Charge Lands & Timber Branch, to Deputy Minister, March 20, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 303).

[98] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 314, 315).

[99] J. Hollies, Acting Indian Agent, to Secretary, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 319).

Hollies also noted that his interpreter, William Kasto, witnessed the signatures of each petitioner. Notably, in a communication from Deputy Superintendent Frank Pedley to Hollies, Pedley advised Hollies of the requirement that any surrender should be effected according to the provisions of the *Indian Act* (assent, then execution by two of the principal men before a stipendiary magistrate or a justice of the peace).[100] A fifth male member, Mahtohkita, of Turtle Mountain petitioned on September 16, 1908, to become a member of Oak Lake.[101] Of the nine members who signed Mahtohkita's acceptance form, three signatories were those who had moved from Turtle Mountain the previous month. As well, the August 1908 forms included the request from the Turtle Mountain residents to move to Oak Lake along with the Oak Lake acceptance, while the September 1908 form included only the acceptance. Hollies reported that only two Oak Lake band members voted against the acceptance of Mahtohkita.[102]

This information is contradicted by John Hunter, the same Oak Lake band member who accompanied Hollies and acted as an interpreter during the census taking the previous January. On September 21, 1908, Hunter wrote to the Indian Commissioner in Winnipeg stating that half of the Oak Lake membership did not want Mahtohkita's application to be accepted.[103] According to the *Indian Act* of 1906, the transfer of an Indian from one band to another had to follow these procedures:

> 17. When, by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the Superintendent General, such Indian shall cease to have any interest in the lands or moneys of the band of which he was formerly a member, and shall be entitled to share in lands and moneys of the band to which he is so admitted.[104]

Hollies noted that one member of the remaining Turtle Mountain families was in the United States and that two others could be treated as though they had left the reserve. Chief Hdamani and Bogaga, he noted, would not consent to live at Oak River IR 58.[105]

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[100] F. Pedley, Deputy Superintendent General, to J. Hollies, Acting Indian Agent, September 3, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 328).

[101] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, September 16, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 329).

[102] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, September 21, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 330).

[103] John Hunter to the Indian Commissioner, September 21, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 331).

[104] *Indian Act*, SC 1906, c. 81, s. 17(1).

In October 1908, Hollies again visited the Turtle Mountain reserve and found that two members, Tetunkanopa and Sunkanapi (identified on the January 1908 census list), had returned to the reserve. Hollies also provided Chief Hdamani and Bogaga with food rations and blankets.[106]

SURRENDER OF THE TURTLE MOUNTAIN RESERVE, 1909

The relocation of some Turtle Mountain residents to Oak Lake appeared to rekindle efforts by government officials to persuade the remaining residents of Turtle Mountain to surrender their reserve. In fact, Hollies wrote in January 1908 of the necessity for surrender, saying:

> The present immoral menace of the reserve of one square mile, made so by its unique position, would justify even drastic measures to end it, but the above are mild, turn no sharp corners, and seem practicable.
>
> The funds, from the sale of 640 acres, unhampered, would go far to readjust the Indians, in a better home with hopeful prospects; and would enable that menacing reserve to be blotted out.[107]

After learning of the transfers, Frank Pedley, Deputy Superintendent General of Indian Affairs, gave permission to Indian Agent Hollies to obtain a surrender of the Turtle Mountain reserve and provided him with the directions and the necessary forms to do so.[108] In reply to Ottawa, Hollies thought that the timing of the proposed surrender vote was not favourable and suggested that it be delayed until the "inclination of the Turtle Mountain Sioux" was more promising.[109]

Hollies' efforts to obtain a surrender did not go unnoticed. S. Swinford, the Inspector of Indian Agencies, wrote to Indian Commissioner Laird that Hollies had succeeded in getting several families to move from the Turtle

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[105] J. Hollies, Acting Indian Agent, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 320).

[106] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, November 2, 1908, NA, RG 10, vol 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 337).

[107] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 296–97).

[108] F. Pedley, Deputy Superintendent General, to J. Hollies, Acting Indian Agent, September 3, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, p. 328).

[109] J. Hollies, Acting Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, November 20, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 339).

Mountain reserve. He also wrote of the three remaining families at Turtle Mountain whom Hollies hoped to induce to relocate to other locales.[110]

In 1909, Hollies seemingly found a more amenable membership when he discussed surrender of the Turtle Mountain reserve. On March 11, 1909, he again visited the reserve and found that two members, Bogaga and Tetunkanopa, had "declared their desire to Surrender the reserve lands; whilst the third, Hdamani #1, wishes to hear direct from you."[111] Hdamani requested that the information come from Indian Commissioner Laird, Hollies reported, because Hdamani took the position that the land had been given to him alone and that he secured it personally. In his report, Hollies noted that all three of the members were over the age of 65, incapable of farming 640 acres, and were on a ration list.[112] Hdamani's request for a meeting was answered by Laird, who wrote directly to the Chief:

> As you are all getting old, and are incapable of farming any of the land in that reserve, I would strongly advise you to remove to another Sioux Indian Reserve and surrender the Turtle Mountain Reserve for sale.
>
> Mr. Hollies states that it is your intention to come to Winnipeg to interview me on the subject, and I wish to advise you that as I am shortly to remove to Ottawa it would be useless for you to come.
>
> Whenever you have decided to surrender the reserve, you may advise Mr. Hollies who will report the fact to the Department, and an official will doubtless be deputed to take the necessary surrender, which I would again advise you to sign.[113]

It is interesting to note that Laird's reply to Hdamani was returned to Laird by Hollies, who advised that the last paragraph should be changed because Hollies himself had been appointed to take the surrender.

Subsequent correspondence by Hollies indicates that Laird wrote another letter to Hdamani. According to Hollies' account, once the Indian Commissioner had written to Chief Hdamani to advise him to surrender the reserve, Hdamani wrote to Hollies asking him to come to the reserve. When he arrived with his interpreter, Hollies found Tetunkanopa absent but Hdamani and Bogaga present. Chief Hdamani asserted that neither Bogaga nor

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[110] S. Swinford, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 12, 1908, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 353).

[111] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 359).

[112] J. Hollies, Acting Indian Agent, to David Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 359).

[113] David Laird, Indian Commissioner, to Chief Hdamani, Turtle Mountain Sioux Reserve, March 17, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, p. 361).

Tetunkanopa had rights to the Turtle Mountain reserve. As Tetunkanopa was away, Agent Hollies halted the proceedings, noting that the surrender papers should be redelivered with the word "Chief" struck out. He also noted that Bogaga, now blind, was living at Oak River, where Hollies could take care of him.[114]

In June 1909, Hollies reported that Tetunkanopa had returned to Turtle Mountain and "awaits the pleasure of the Department in the matter of 'Surrender.'"[115] Hollies referred to his letter of April 28, 1909, and again requested the modification of the surrender papers. He stated:

> You will observe that since the "Chief" Hdamani is obdurate, and will not do as he promised The Commissioner re surrender, but claims the reserve as all his own, the present "Surrender" papers are not applicable, – hence I return the same to be modified, and made applicable to the present date and conditions.[116]

On June 9, Hollies requested authority to travel to the Turtle Mountain reserve to obtain a "Surrender of that Reserve."[117] One week later he received permission to do so. In a letter dated June 16, 1909, Pedley forwarded the amended forms of surrender and instructed Hollies to make a "special visit to the reserve in regard to the surrender."[118]

On August 5, 1909, Hollies visited Turtle Mountain IR 60 and informed the members that a meeting of the Band would be held the next day to consider the surrender of the reserve.[119] On August 6, 1909, Hollies, with an interpreter, met with the Band at Chief Hdamani's house to discuss the surrender. Three people (Bogaga, Tetunkanopa, and his son Charlie Tetunkanopa) voted in favour of the surrender of the Turtle Mountain reserve. Two people (Hdamani and his grandson Chaske)[120] voted against surrender.[121] Agent Hollies also noted that all three who voted in favour travelled with him to

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[114] J. Hollies, Acting Indian Agent, to Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 367–69).

[115] J. Hollies, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, June 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 372).

[116] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, June 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 372).

[117] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, June 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 373).

[118] F. Pedley, Deputy Superintendent General, to J. Hollies, Indian Agent, June 16, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 374).

[119] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

[120] Also referred to as Charlie Eagle in later communications.

[121] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

Deloraine in order to find a qualified person to take the affidavit. On August 9, the surrender papers were signed in the presence of Deloraine Chief of Police Charles E. Stevens, and the affidavit was executed by Tetunkanopa and Hollies in the presence of Justice of the Peace T.K. Spence.[122] Hollies also noted that he valued the land at $18 an acre and that those who voted in favour of surrender did so because Chief Hdamani insisted that the land was his alone. A statement showing values and improvements on the reserve was attached to this report.[123]

The surrender document was signed by the three men who had voted for the surrender – Bogaga, Tetunkanopa, and Charlie Tetunkanopa. Terms of the surrender were as follows:

> ... all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, and sufficient of the proceeds of the sale to give the Indians a start in their new homes, and also sufficient to compensate the owners of improvements situate on the land hereby surrendered, be placed to our credit and interest thereon paid to us in the usual way ...[124]

Order in Council PC 1788 was passed on August 28, 1909, accepting the surrender of Turtle Mountain IR 60.[125] Although the surrender of the reserve was confirmed in 1909, its actual creation occurred four years later, by virtue of Order in Council PC 2876 on November 21, 1913, when the Turtle Mountain reserve was withdrawn from the operation of the *Dominion Lands Act*.[126]

On September 2, 1909, John Hughes, a resident of Deloraine, wrote to the Minister of the Interior on behalf of Chief Hdamani and stated that the Chief had not received anything after Bogaga and Tetunkanopa moved away. Further, Hughes complained that those two Turtle Mountain members had received sums of money and Hdamani had not, and that the Chief considered this treatment an injustice.[127]

Although the reserve was surrendered in 1909, some members of the Band continued to occupy it. In his annual report for the Griswold Agency for the fiscal year ending March 1910, Hollies stated that "the total number remaining on this reservation is 9, 6 having migrated south of the line during the year."[128] A year later, Hollies again described the population at Turtle Mountain: "[T]here are now 8 Indians remaining on the Reserve, 2 of these will go to the Oak Lake Reserve, and the remaining 6 will probably go south, from whence they came."[129]

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[122] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–83).

[123] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 384).

[124] Surrender, August 9, 1909, NA, RG 2, series 1, col. 115 (ICC Documents, Exhibit 1, p. 376).

[125] Canada, Order in Council PC 1788, August 28, 1909 (ICC Documents, Exhibit 1, p. 386).

[126] Canada, Order in Council PC 2876, November 21, 1913 (ICC Documents, Exhibit 1, pp. 546–49).

[127] John Hughes to Minister of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

Distribution of Proceeds from the Sale of Turtle Mountain IR 60

An attempt by the Department of Indian Affairs to sell the four quarter sections of land (640 acres) on the Turtle Mountain reserve on December 15, 1909, met with no success because of the high valuation placed on it by the Indian Agent.[130] J.P. Morrison, the auctioneer of the abortive sale of the reserve, wrote to the department stating that Chief Hdamani had requested $2,000 for his claim related to the Turtle Mountain reserve.[131]

The Canupawakpa Dakota First Nation has not raised the issue of Canada's lawful obligation, if any, after the surrender, and we therefore make no findings in this regard. We outline sufficient detail here only to complete the story.

The claims and administration relating to the proceeds are complex, but it would appear from a review of the documents that

- Bogaga (a signatory of the surrender) requested $300 from the department as an early recompense for his lands and to secure a team of horses, a harness, and a rig at Oak River reserve.[132]
- In July 1910, the three families who had migrated to Oak Lake in 1898 requested that the department compensate them for their interests in the sale of the Turtle Mountain reserve.[133]

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[128] J. Hollies, Indian Agent, to F. Pedley, Deputy Superintendent General, April 1, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st March, 1910*, 108 (ICC Documents, Exhibit 1, p. 409).

[129] J. Hollies, Indian Agent, to F. Pedley, Deputy Superintendent General, April 1, 1911, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st March, 1911*, 89 (ICC Documents, Exhibit 1, p. 443).

[130] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, December 18, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 395).

[131] J.P. Morrison, auctioneer, to the Department of Indian Affairs, January 8, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 398).

[132] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, February 7, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 402).

[133] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, July 14, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 415–16).

- When Agent Hollies visited Oak Lake IR 59 on July 5, 1910, he was asked to examine the issue of promises allegedly made by former Indian Agent Markle to the three families (Kasto, Kibana Hota, and Iyo-jan-jan) who migrated to Oak Lake reserve 12 years before.[134]
- John Thunder, the interpreter at that time, stated that Agent Markle had promised the transferring families a share in the reserve; Agent Hollies stated that this commitment was impossible because Mr Markle would not make such an error.[135]

In response to Hollies' letter, on September 23, 1910, Indian Commissioner David Laird wrote a long account of the history of the Turtle Mountain Band in which he stated that a number of former members of the Band who did not take part in the surrender appear to have a claim to compensation.[136] He could not find transfer papers for the first three people on the list (Iyo-jan-jan, Widow Kasto, and Kibana Hota),[137] the first transferees of 1898.

All the Sioux who lived for many years at Turtle Mountain and who relocated to the Oak Lake reserve before the surrender were qualified by Laird as "squatters." Other Sioux who disappeared from Turtle Mountain before the surrender were termed "stragglers."[138] Laird believed that at least some of the "squatters" should share in the proceeds of the sale of the Turtle Mountain reserve. He seems to have arrived at his suggested dispensation of

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[134] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, July 14, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 415–16). In this letter, Indian Agent Hollies miscalculates the length of time since the three families had moved away from Turtle Mountain as being 15 years, when in fact it was 12 years. Hollies also refers to the third family's name as being "Old Mary's family." In all other references on record, this family was referred to as the Iyo-jan-jan family, so it can be safely assumed that "Old Mary's family" and the "Iyo-jan-jan" family are one and the same.

[135] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, July 14, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 415–16).

[136] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 423–29). The list was as follows:

	Admitted to Oak Lake Reserve
Iyo-jan-jan,	May 24, 1898
Widow Kasto,	May 24, 1898
Kibana Hota,	May 24, 1898
George Naviowaza,	August 27, 1908
Mahtaita,	August 27, 1908
Sam Eagle,	August 27, 1908
Hinhunsanna,	August 27, 1908
Mahtohkita,	September 16, 1908

[137] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 425–26).

[138] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 423, 426). Evidence in the record shows that a band member who appeared on the 1908 January census was told by the Chief of Police in November 1908 that he was no longer allowed to stay on the reserve (ICC Documents, Exhibit 1, p. 337).

proceeds on the basis that Hdamani and the other voting members had been "squatters" at Turtle Mountain, so it would be unfair to deny other long-term "squatters" who relocated to Oak Lake a share in the proceeds. Laird also advised that Chief Hdamani, Bogaga, and Bogaga's wife, being "old and helpless, as well as having a claim to the largest share in the funds, should be provided for while they live."[139]

Under his logic, Hdamani, Bogaga, and Bogaga's wife were each to receive $500 in a lump sum and $240 a year for the rest of their lives.[140] Tetunkanopa, Laird reasoned, should also receive $500 in a lump sum, but since he was younger than Hdamani and Bogaga, he should receive an annual share in the interest moneys on the proceeds. Hdamani's grandson Chaske and Tetunkanopa's son Charlie Tetunkanopa would receive $300 and interest moneys from the proceeds.[141] The remaining eight families who moved to Oak Lake reserve from Turtle Mountain, he argued, should receive $200 per family.[142] On the death of Hdamani, Bogaga, and Bogaga's wife, he said: "I would recommend that the whole principal money (and interest, if any) be placed to the credit of the Oak Lake band, or in fair proportion to any other band which has received into membership others in any way recognized as belonging to the Turtle Mountain band, as some compensation for giving the latter a share in their reserve."[143]

David Laird was mistaken in his belief that the reserve had already been sold, as the auction of the lands on Turtle Mountain was not carried out until May 3, 1911.[144] The sale of lands at Turtle Mountain represented 10 per cent of the total proceeds and resulted in the deposit of $632.50 into the accounts of the Turtle Mountain Band.[145]

On May 12, 1911, J.D. McLean wrote to Indian Agent Hollies and enclosed a cheque for $155 for Chief Hdamani as payment for his improvements on Turtle Mountain. McLean also asked Hollies to recommend to what extent the members of the Band who had settled on the other reserves should be assisted from the proceeds of the sale of the Turtle Mountain reserve.[146] On May 27, 1911, Hollies replied, asking for a payment of $630 for Bogaga.[147] This second request for aid to Bogaga again elicited a response from Laird, who wrote:

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[139] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 427).

[140] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 427).

[141] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 427).

[142] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 427–28).

[143] David Laird, Indian Commissioner, to Accountant, September 23, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 428).

[144] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, May 5, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 447).

[145] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, May 5, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 447).

> Mr. Hollies, also appears to hold that only the five members of the Turtle Mountain band, who took part in the voting at the time of the surrender, have any claim to share in the proceeds of the sale. As I showed in my memo, to you, dated, the 23rd September, 1910, page 3, there were eight sioux, formerly of Turtle Mountain reserve, who were admitted into the Oak Lake band at different dates. These Indians loyally acceded to the wishes of the Department, and removed to Oak Lake, and ought not to be altogether overlooked now, when the reserve is sold, in the distribution of the proceeds.[148]

In response to a query from McLean, Hollies provided the Department of Indian Affairs with a list of the names and whereabouts of the eight Indians who had migrated from Turtle Mountain IR 60 to Oak Lake IR 59, along with the five who remained and voted on the question of the reserve. Of these five he wrote:

> No. 9 Tetunka-nopa, of Turtle Mountain reserve, and family are now in Montana
>
> No. 10 His son Charley, is also in Montana
>
> It is stated by Indians that Nos. 9 & 10 have become members of Fort Peck band of Indians and will only return for their share of funds from the sale of Turtle Mountain Indian Lands.
>
> No. 11. Hadamini, 74 years (Aug 16th), late chief of Turtle Mountain Indian reserve #60, is now on a visit to this Agency and reserves. He is unwilling to acknowledge the sale of reserve #60, and is not willing to take the $155.00 for his house. He stated that his grandson Charley Eagle was Part owner of the house as he had put on the roof, but the chief would make no statement in writing that I should pay a part to his grandson.
>
> He relies considerably upon a letter, with green ribbon and sealing wax from Lieutenant-Governor Morrison [sic Morris] stating he, the Governor, would do his best to secure a reserve for the Sioux Indians on Turtle Mountain. This letter I read to

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[146] J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs, to J. Hollies, Indian Agent, May 12, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 456).

[147] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, May 27, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 458–59).

[148] David Laird, Indian Commissioner, to Accountant, June 19, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 464).

> him, and explained as I have often done, that the majority in favour of selling the reserve always rules. I asked him to make this Oak River reserve his home. He said I might sell the reserve. Yes, I said, if fifty-one out of a hundred wanted to surrender it for that purpose, it would be sold. He wished me good-bye, as he would never see me again. I repeatedly asked him what should be done with the $155.00 allowed for his house, but he would make no statement as to that or of his future.
>
> No. 12. His grandson, Charley Eagle is visiting Oak Lake reserve #59, and applied for admittance, but the band asked $500.00 for this privilege. Nothing definite has been determined.
>
> No. 13. Bogaga, the last one of the Turtle Mountain reserve list is blind, and with his wife resides on Oak River reserve near his grand-daughter. This man with his wife has been rationed as a destitute for the last few years, part of the time at Turtle Mountain, part of the time at Oak Lake reserve, and the last year at Oak River reserve.... My plan in conjunction, was by means of his property, to make him independent of Department help, and that his friends should unite in assisting him. Bogaga, being blind, is dependent upon his wife. He should have a home of his own. Bogaga feels, that, by himself, he can do nothing.[149]

In April 1912, the Department of Indian Affairs approved the purchase of a team of horses for Bogaga at a cost of $500.[150] On August 18, 1912, Hdamani died at the Oak River reserve without realizing any moneys from the sale of Turtle Mountain IR 60.

Three separate distribution payments realized from the sale of Turtle Mountain IR 60 were allowed in 1913, 1914, and 1917. The first distribution, on February 8, 1913, was made not only to the parties at the surrender meeting but also to those who transferred to Oak Lake IR 59 in 1898 and 1908. The amount of each distribution varied. The second and third distributions in 1914 and 1917 were only to the parties, or their heirs, at the surrender meeting.[151] On March 23, 1956, a total of $20,534.27 was transferred from the Turtle Mountain Trust Fund Account into the Oak Lake Sioux Trust Fund Account "as compensation for taking 8 Turtle Mountain families into their membership."[152]

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[149] J. Hollies, Indian Agent, to J.D. McLean, Secretary, August 17, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1 pp. 479–81).

[150] J.D. McLean, Secretary, to J. Hollies, Indian Agent, April 3, 1912, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, p. 499).

[151] B.E. Olson, Indian Affairs Branch, to W.C. Bethune, Acting Superintendent, Reserves & Trusts, Indian Affairs Branch, January 27, 1956, DIAND file 501/30-37-60, vol. 1 (ICC Documents, Exhibit 1, p. 648).

[152] Journal Voucher, S.A. Richards, Head, Trust Division, Indian Affairs Branch, March 23, 1956, DIAND file 501/30-37-60, vol. 1 (ICC Documents, Exhibit 1, p. 655).

PART III

ISSUES

By agreement of the parties, the Indian Claims Commission has been asked to inquire into the following issues:

1 Was Turtle Mountain Indian Reserve No. 60, also known as Section 31-1-22W, constituted and set aside by Canada as a reserve within the meaning of the *Indian Act*?

2 Does the surrender, purportedly made by the Turtle Mountain Band of Indians (the Band) on August 6, 1909 (the Surrender of 1909), accord with the provisions of the *Indian Act* of 1906, namely:

   a) Was the party Bogaga habitually resident on or near and interested in the reserve at the time when the surrender was considered and approved at a meeting of Council, i.e., was Bogaga entitled to vote or be present at such a meeting of Council?

   b) Were the requirements of the *Indian Act*, and in particular section 49(3) in terms of completion of the affidavit, properly complied with, i.e., was the assent by the Band certified on oath by some of the Chiefs or principal men present at the meeting and entitled to vote?

   c) And if not, is the surrender invalid?

3 What duties and obligations, fiduciary or otherwise, if any, did Canada owe to the Band in relation to the interests of the Band and its members in the taking of reserve lands by way of surrender?

   a) Did Canada owe a fiduciary obligation in respect of the taking of reserve lands?

   b) Did Canada owe a duty to act without conflict of interest in respect of the said taking of reserve lands?

c) Did Canada owe a duty to act with reasonable care in protecting the interests of the Band and its members in respect of the said taking of reserve lands?

d) Did Canada owe a duty to act with honour in its dealing with the Band and its members in respect of the said taking of reserve lands?

e) Did Canada have a duty to act without the exercise of duress, undue influence, coercion, or other unfair practices in the course of conduct adopted by its agents in respect of the said taking of reserve lands?

4 Did Canada fail to fulfill any of the said duties or obligations to which it was subject?

5 If Canada failed to fulfill any of such duties or obligations, is said conduct by Canada sufficient to render void the Surrender of 1909 or to result in Canada's having an outstanding lawful obligation to the First Nation in respect of the taking of reserve lands?

NOTE: If issue 5 is ultimately answered in the affirmative, there will remain outstanding the question as to the extent to which the claimant First Nation should be entitled to compensation. Although the issue of compensation is not addressed by the Indian Claims Commission in respect of the inquiry into Canada's rejection of this Specific Claim, the First Nation claimant reserves its right to address the issue of compensation subsequently should it become appropriate to do so.

PART IV

ANALYSIS

The Indian Claims Commission has been asked in this inquiry to determine whether Canada owes an outstanding lawful obligation to the Canupawakpa Dakota First Nation as a result of events surrounding the surrender of Turtle Mountain IR 60 in 1909. By agreement of the parties, the Commission has been asked to inquire into a number of issues. These issues can be divided into two categories: statutory compliance and fiduciary duty. In the first category, the Commission discusses the reserve as a *de facto* reserve and reviews the statutory requirements for surrender to determine the validity of the surrender – namely, that the signatories be habitually resident on the reserve; that the signatories be near to and interested in the reserve; the entitlement of the voter Bogaga; and the completion of the affidavit.

Next, the Commission examines the issues related to the duties and obligations potentially owed to the Band with respect to the taking of reserve lands by surrender. In preparation for this inquiry, the parties agreed on the issues as outlined in Part III of this report. In particular, the Commission was asked to determine if any fiduciary obligations were owed with regard to the taking of reserve lands – namely, whether Canada owed a duty to act without conflict of interest; a duty to act with reasonable care; a duty to act with honour; and a duty to act without the exercise of duress, undue influences, or unfair practices with respect to the taking of the reserve. In their written and oral submissions on these issues, the parties chose to depart from their agreed-on formulation of the issues and instead chose to present their arguments regarding these enumerated duties following a *Guerin* and *Apsassin* analysis. The Commission has, therefore, undertaken an analysis of the adequacy of the Band's understanding of the terms of surrender; whether the Band abnegated its decision-making power to the Crown; and whether the Crown engaged in either tainted dealings or accepted a decision of the Band which amounted to an exploitative bargain.

If any or all of these obligations were owed to the First Nation, the Commission will determine whether Canada fulfilled the duties or obligations to which it was subject and, if not, whether this conduct is sufficient to void the surrender or otherwise create an outstanding lawful obligation to the First Nation. If this last question is answered affirmatively, the issue of compensation remains. While the issue of compensation is not addressed by the Indian Claims Commission in this inquiry into Canada's rejection of this Specific Claim, the First Nation reserves the right to address the issue of compensation subsequently should it become appropriate to do so.

ISSUE 1 VALIDITY OF THE RESERVE AND ITS SURRENDER

Was Turtle Mountain Reserve No. 60, also known as Section 31-1-22W, constituted and set aside by Canada as a reserve within the meaning of the *Indian Act*?

This issue is no longer outstanding and does not require determination by the Commission. In accordance with the January 23, 1995, letter from Canada to Chief Alvina Chaske about the preliminary federal position on this claim,[153] the Commission and the parties all accept that the land in question was a *de facto* reserve. In its original rejection of this claim, Canada took the position that "[i]t was not necessary to decide this issue in order to come to a conclusion on the claim, therefore it has been assumed that Section 31-1-22-W1 was a reserve within the meaning of the *Indian Act*."[154] In the initial planning conference of this inquiry, the First Nation raised the question of the legal status of Turtle Mountain IR 60 as a matter to be determined by the Commission; during the course of this inquiry, however, Canada clarified its view: "[T]heTurtle Mountain No. 60 became a *de facto* reserve at the latest by 1890 because of its clear demarcation, its treatment by the Crown and its continued use by the Turtle Mountain band. In particular, the Crown treated the tract as a reserve when it obtained the surrender in 1909."[155] This admission was accepted by the First Nation.

As a result, the analysis of the remaining issues is founded on the position that Turtle Mountain had become a *de facto* reserve.

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[153] Jack Hughes, Research Manager, Specific Claims West, DIAND, to Chief Alvina Chaske, Oak Lake Sioux First Nation, January 23, 1995, file BW8260/MB289-C1 (ICC Exhibit 16a).

[154] Jack Hughes, Research Manager, Specific Claims West, DIAND, to Chief Alvina Chaske, Oak Lake Sioux First Nation, January 23, 1995, file BW8260/MB289-C1 (ICC Exhibit 16a).

[155] Uzma Ihsanullah, Counsel, DIAND, Legal Services, to Kathleen Lickers, Commission Counsel, ICC, and Paul Forsyth, Counsel, Taylor McCaffrey, February 9, 2001 (ICC file 2106-13-01, vol. 1).

ISSUE 2 DOES THE SURRENDER OF 1909 ACCORD WITH THE *INDIAN ACT* OF 1906?

Does the surrender, purportedly made by the Turtle Mountain Band of Indians (the Band) on August 6, 1909 (the Surrender of 1909), accord with the provisions of the *Indian Act* of 1906?

We shall examine this issue through three sub-issues, 2(a), 2(b), and 2(c).

Issue 2(a) Was Bogaga Entitled to Vote at a Meeting of Council?

Was the party Bogaga habitually resident on or near and interested in the reserve at the time when the surrender was considered and approved at a meeting of Council, i.e., was Bogaga entitled to vote or be present at such a meeting of Council?

The statutory provisions to be followed in the taking of a surrender are found in section 49 of the 1906 *Indian Act*:

> 49(1) Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> (2) *No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.*
>
> (3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the Province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
>
> (4) When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[156]

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[156] *Indian Act*, RSC 1906, c. 81, s. 49. Emphasis added.

Section 49 requires that, in order to vote on the question of a surrender of reserve land, a person must be a male band member over the age of 21 who "habitually resides on or near" the reserve in question and who "is interested in" the reserve. The primary issue is whether Bogaga was habitually resident on the reserve at the time of the surrender vote. The question whether Bogaga habitually resided "near" the reserve need be examined only if we do not find him to be habitually resident on the reserve. With respect to Bogaga's eligibility to vote, the other requirements of the statute are not in issue, although we shall comment on the element of "interested in" as it relates to Bogaga.

Did Bogaga Habitually Reside on or near the Reserve?

The First Nation takes the position that Bogaga was no longer resident at Turtle Mountain at the time the surrender vote was taken and, therefore, he was ineligible to vote. In its submission, the First Nation states:

> Evidence indicates that prior to the Surrender vote, Bogaga was no longer habitually residing on or near the Turtle Mountain Reserve. In addition, evidence supports the view that Bogaga was completely under the control and influence of Indian Agent Hollies as was, for that matter, the entire timing, process and outcome of the so called Surrender vote.[157]

The First Nation relies heavily on Agent Hollies' April 28, 1909, letter to the Secretary of Indian Affairs in which Hollies reports "that Bogaga who has long been a victim to painfully weak eyes is now blind and is living on the Oak River reserve #58 where I can look after him."[158] Counsel for the First Nation argues that "at this stage, although the [March 11, 1909] meeting took place at the house of Hdamani, there is no express indication that Bogaga was residing at the Turtle Mountain Reserve at this time. On the contrary, the evidence suggests that by this time Bogaga had moved his residence to the Oak River Reserve."[159]

In contrast, Canada takes the position that the central piece of undisputed evidence is the affidavit sworn by Tetunkanopa dated August 9, 1909, attesting that the surrender was properly taken from all eligible voters.[160] Canada also relies on the principles of statutory interpretation identified in several sources[161] and looks to the historical documentation and the community evidence to arrive at its position. On that basis, Canada holds that Bogaga was habitually resident at Turtle Mountain at the time of surrender and was therefore an eligible voter.

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[157] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 4.

[158] J. Hollies, Acting Indian Agent, Griswold Agency, to the Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 369), in Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

[159] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

In particular, Canada submits that, although the phrase "habitually resides" has not been the subject of judicial interpretation in the context of the *Indian Act*, it should be defined according to the standard developed in *Dicey and Morris on the Conflict of Laws*:

> It is evident that "habitual residence" must be distinguishable from mere "residence". The adjective "habitual" indicates a quality of residence rather than its length. Although it has been said that habitual residence means "a regular physical presence which must endure for some time", it is submitted that the duration of residence, past or prospective, is only one of a number of relevant factors; there is no requirement that residence must have lasted for any particular minimum period.[162]

The 1987 Alberta Court of Appeal case of *Adderson v. Adderson*, cited by Canada, confirms that, in Canadian law, the test to be used for "habitual residence" is the quality of residence.[163] The court stated that the quality of residence is determined by weighing a number of different factors, with duration being but one of them. It was also found that "habitual residence" exists on a continuum somewhere between mere residence and domicile. Habitual residence, Canada argues, is established in a particular place if the person "resides there for a time and with a continuity that indicates more than mere physical presence at a location."[164]

Canada also submits that the standard of "ordinary residency" should be determined according to the principles established in the Supreme Court of Canada's decision in *Canard v. Attorney General of Canada and Rees*.[165] In this case, the courts were asked to decide, for estate administration purposes, whether a deceased Indian, at the time of his death, ordinarily resided on the Fort Alexander reserve. The Court determined that a person is "ordinarily resident" if there is some degree of continuity, even if there has been an established pattern of temporary, occasional, or casual absences.[166]

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[160] Surrender Affidavit, August 9, 1909 (ICC Documents, Exhibit 1, p. 378), as cited in Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 12.

[161] J.H.C. Morris, ed., *Dicey and Morris on the Conflict of Laws*, 10th ed. (London: Stevens & Sons, 1980), 144–45; *Adderson v. Adderson* (1987), 36 DLR (4th) 631 (Alberta CA); *Canard v. Attorney General of Canada and Rees*, [1972] 5 WWR 678 at 682 (Manitoba CA), affirmed by *Canard v. Canada*, [1976] 1 SCR 170, on the same grounds; ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 55.

[162] J.H.C. Morris, ed., *Dicey and Morris on the Conflict of Laws*, 10th ed. (London: Stevens & Sons, 1980), 144–45, as quoted in Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 10.

[163] *Adderson v. Adderson* (1987), 36 DLR (4th) 631.

[164] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 10.

[165] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 11.

The Commission has previously considered the meaning of "habitually resides on or near" and the *Canard* decision in *Duncan's First Nation Inquiry 1928 Surrender Claim*.[167] As stated in the *Duncan's First Nation Inquiry*,[168] there does not appear to be any reported decision that has considered the meaning of the phrase "habitually resides on or near, and is interested in the reserve in question" within the context of the *Indian Act*. Accordingly, the First Nation submits that the meaning of this phrase must be gleaned from the findings of the Commission in the *Duncan's First Nation Inquiry*:

> [W]e take from these authorities [*Canard*, *Adderson*] that an individual's "habitual" place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite "temporary or occasional or casual absences." Although such residence entails "a regular physical presence which must endure for some time," there is no fixed minimum period of time and the duration of residence, past or prospective, is only one of a number of relevant factors, the quality of residence being the overriding concern. It is not clear to us that there is a significant difference between "habitual" and "ordinary" residence, and similarly we are unsure whether it matters on the facts of this case.[169]

We are prepared in this claim to adopt the definition in the *Duncan's First Nation Inquiry*. In particular, we must examine on the facts of this case whether Turtle Mountain was the location to which Bogaga customarily or usually returned "with a sufficient degree of continuity to be properly described as settled" and to which he did not cease to be a habitual resident despite "temporary or occasional or casual absences." In addition, we consider the quality of Bogaga's residence to be of paramount concern. In our view, only a detailed examination of the evidence related to Bogaga's residency can assist in making this determination. The evidence leading up to and following the August 6, 1909, surrender vote can be summarized as follows:

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[166] *Canard v. Attorney General of Canada and Rees*, [1972] 5 WWR 678 at 682 (Manitoba CA).

[167] ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 55.

[168] ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000)12 ICCP 55.

[169] ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 55 at 172–73, as quoted in Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 11.

- *1862–circa 1940s*: Sioux Indians divide their residency over what becomes the international border between Canada and the United States.[170]
- *January 4, 1873*: Sioux Indians, 80 families, are said to be living in the border territory near the international boundary line. Sioux leadership petitions for reserve land after an exodus from the United States.[171]
- *February 17, 1874*: Bogaga writes a letter from Turtle Mountain to the Commissioner of the [International] Boundary Commission requesting planting materials and horses.[172]
- June 26, 1877: Bogaga appears on "a list of names of the Sioux of Turtle Mountain" prepared by Alexander Morris after a visit with Hdamani.[173]
- *May 23, 1898*: In correspondence with the "Indian Department," Indian Missionary John Thunder indicates that three families have moved from Turtle Mountain following direction from the "Indian Department."[174] Thunder identifies Bogaga as the head of one of the three families remaining at Turtle Mountain. Chief Hdamani and Tetunkanopa are the other heads of families.
- *April 23, 1901*: Bogaga appears on the official census of Canada for the Municipality of Winchester, township 23, range 22 (Turtle Mountain).[175]

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[170] Peter Douglas Elias, *The Dakota of the Canadian Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988) (ICC Exhibit 11, pp. 17, 22); J.A. Markle, Indian Agent, Birtle Agency, to Superintendent General of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896* (ICC Documents, Exhibit 1, pp. 216–25); ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 16, 77, S. Wasteste; p. 32, Morris Kinyewakan; p. 47, Aaron McKay); ICC Transcript, January 17, 2002 (ICC Exhibit 14b, p. 195, Philip HiEagle).

[171] Alexander Morris, Lieutenant Governor, Province of Manitoba & the NWT, to Minister, Department of the Interior, August 4, 1873, NA, RG 10, vol. 3605, file 2905 (ICC Documents, Exhibit 1, pp. 1–9), Original and Copy of a "Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor General in Council on the 4th January 1873."

[172] Bogaga, Turtle Mountain, to Captain D.R. Cameron, Commissioner, International Boundary Commission, February 17, 1874, NA, FO 302/3, reel B-5320 (ICC Exhibit 12, pp. 55–56).

[173] Alexander Morris, Lieutenant Governor, Province of Manitoba & the NWT, to Minister, Department of the Interior, June 26, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 49).

[174] John Thunder, Indian Missionary, to the Indian Department, May 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 241).

[175] Excerpts of the "Fourth Census of Canada, 1901," NA, vol. 1, reel T-6432 (ICC Exhibit 13a, p. 1, line 28).

- *Circa August 13, 1907*: Indian Agent Hollies reports that, after touring the Turtle Mountain reserve, he saw only "rightful" inhabitants of the reserve.[176]

- *January 31, 1908*: Bogaga and his wife are identified as old and feeble; Indian Agent Hollies states they should be provided for as "Old and Destitute"[177] and could be moved to the Oak River Reserve. Accompanying this report is Agent Hollies' "Tabular Statement on Turtle Mountain Reserve IR 60 as to population, age and sex." Bogaga's name and his age, 80, appear on this statement.[178]

- *July 2, 1908*: Agent Hollies writes: "Bogaga #2 is at Fort Totten as he is very old I shall upon his return endeavour to persuade him also to join Hadamani on the Oak River reserve and live a free and easy life and a sure living for the rest of his days."[179]

- *August 11, 1908*: Agent Hollies' report indicates that Hdamani and Bogaga will not consent to live at the Oak River reserve. They are given provisions to last until September and advised to speak to Hollies at the Griswold Agency for more provisions.[180]

- *November 2, 1908*: Hdamani and Bogaga receive food orders to last until the end of December at Turtle Mountain. Each receives a blanket.[181]

- March 15, 1909: In this letter, Agent Hollies writes to the Indian Commissioner that, having met with the three remaining members at Hdamani's place:

> I have the honour to state that two members out of the three owning the reserve, that is, Bogaga #2 and Tetunkanopa #3 have declared their desire to Surrender the reserve lands; whilst the third, Hadamani #1, wishes to hear direct from you, the

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[176] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 287–90).

[177] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 291–98).

[178] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 296, 298–99).

[179] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 315).

[180] J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 320).

[181] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, November 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, pp. 336–38).

> Head, as to your wishes in the matter, as he says "Whatever the head wishes me to do, I will carry out."[182]

- *April 28, 1909*: Agent Hollies reports on two visits to the Turtle Mountain IR 60. His first visit is on March 11, 1909, when he reports that "the three members of the band met at the house of Hdamani." His second visit is on April 22, when he meets with Hdamani and Bogaga. Hollies states that Hdamani will not heed the Commissioner's advice to surrender the reserve, as set out in a letter to Hdamani, "but takes the position very strongly, that he alone owns the reserve, that Bogaga has no say in the matter neither has Tetunkanopa." In addition, Hollies writes:

  > If I may, I would beg to call attention to the "Surrender Papers" and request that a new form in duplicate be forwarded to this Agency, redated, and with the word "Chief" expunged; then as soon as I can find Tetunkanopa and get him here, I will arrange to secure "Surrender to the King" (2 to 1) of the reserve. I would report that Bogaga who has long been a victim to painfully weak eyes is now blind and is living on the Oak River reserve #58 where I can look after him.[183]

- *August 6, 1909*: According to Hollies' report of August 12, 1909, the surrender meeting is held at Hdamani's house on this date and the surrender vote is taken: Bogaga, Tetunkanopa, and his 22-year-old son, Charlie, vote in favour of surrender; Hdamani and his 22-year-old grandson, Chaske, vote against it.[184]

- *August 9, 1909*: The surrender document is signed and the proof of assent affixed.[185] Notably, there is no objection to Bogaga signing the surrender at this time.

- *August 12, 1909*: Indian Agent Hollies reports on the surrender process and directs a copy of the surrender document to Indian Commissioner David Laird. The report states that he visited the reserve at the Commissioner's behest on August 5 and provided notice that there would be a meeting on the 6th to consider surrendering the reserve. The meeting took place at Hdamani's home on the 6th and the vote result and witnessing occurred as follows:

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[182] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, pp. 359–60).

[183] J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 367–69).

[184] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

[185] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1, and also DIAND, Land Registry Office, Instrument Number 15907 (ICC Documents, Exhibit 1, pp. 375–81).

> Bogaga #2, Tetunka-Nopa #3, and his son Charlie (now 22 years) voted in favour of Surrender; three; while Hadamani #1, and his grandson Chaske, (now 22 years) voted against it.... Immediately afterwards, Bogaga, with Tetunka-nopa and his son Charlie, proceeded to Deloraine to sign Surrender papers, and Tetunka-nopa to make Affidavit as required with myself as Bogaga is blind. But here at Deloraine, and within reasonable distance, was not to be found A competent person such as the Indian act requires before whom I with Tetunka-nopa, could certify on oath, that such "Surrender" had been assented to by the band; and finally had to be deferred till the 9th, when I could secure a J.P. from Medora to visit Deloraine for that purpose.[186]

- *August 12, 1909*: In the same report, Indian Agent Hollies attaches a table showing "improvements and owners of improvements on Turtle Mountain #60 at date of surrender August 9/09." Bogaga's name, with $26 in improvements for a house and stable, is on the list.[187]

- *September 2, 1909*: Deloraine resident John Hughes writes to the Minister of the Interior on Hdamani's behalf, requesting proceeds from the surrender of the reserve and claiming that Bogaga's and Tetunkanopa's receipt of their share of the proceeds in the absence of Hdamani's receipt of his share is unjust. Hughes also states that Bogaga and Tetunkanopa have moved away to another reserve.[188]

- *February 7, 1910*: Hollies reports that "Bogaga, who is blind, and with his wife lives on the Oak River Res. and are rationed by me..."[189]

- *May 27, 1911*: Hollies reports: "This leaves only blind Bogaga and his wife, who intend to build and reside [on] the Oak River reserve, near the Grand-daughter's residence which is 2 miles North of this Agency. This grand-daughter has been looking after him the last 3 years."[190]

- *August 17, 1911*: Hollies reports that "Bogaga ... is blind, and with his wife resides on Oak River reserve near his grand-daughter. This man with his wife has been rationed as a destitute for the last few years, part of the time at Turtle Mountain, part of the time at Oak Lake reserve, and the last year at Oak River reserve."[191]

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[186] J. Hollies, Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

[187] J. Hollies, Indian Agent, to J.D. McLean, Secretary, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 384).

[188] John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

[189] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, February 7, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 402).

[190] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, May 27, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 458).

- *March 25, 1912*: Hollies reports that Bogaga's granddaughter and her husband, Angus McKay, have looked after Bogaga and his wife now for three years.[192]
- *Circa 1920s*: Agnes Young, born at Oak Lake reserve in 1910, testified at the community session that, after Bogaga and his wife left Turtle Mountain, they moved first to Sioux Valley, then to Oak Lake, where Mrs Young, as a girl, took care of him while his wife worked. Mrs Young stated that Bogaga, who was old and blind at the time, returned to Sioux Valley, where he died.[193]

Although the testimony provided at the community sessions for this inquiry assists in understanding the movements of Bogaga in the months following the surrender, it does not provide detailed information about Bogaga's residence on August 6, 1909, the date of the surrender meeting. Agnes Young's testimony is based primarily on her personal knowledge of Bogaga after he came to the Oak Lake reserve from Sioux Valley[194] and is understandably limited in establishing the precise time when Bogaga moved from Turtle Mountain. In response to Commission counsel's inquiry as to the date when Bogaga came to Oak Lake, Mrs Young, through interpreter Rosie Chaskie, replied: "After he got kicked out. They lived in Sioux Valley, but then they came over here [Oak Lake] and his wife worked, so she [Agnes Young] looked after him, fed him whatever his wife left cooked."[195]

In addition, the oral testimony of Elder Stewart Gordon Wasteste, while beneficial, did not provide us with enough information with respect to Bogaga to support the First Nation's position that he was not habitually resident on the Turtle Mountain reserve at the time of the surrender. Elder Wasteste's evidence only peripherally addressed the nature of Bogaga's residency:

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[191] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 17, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 481).

[192] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, March 25, 1912, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 494).

[193] ICC Transcript, January 17, 2002 (ICC Exhibit 14b, pp. 239–40 and 251–52, Agnes Young).

[194] ICC Transcript, January 17, 2002 (ICC Exhibit 14b, pp. 239–40 and 251–53, Agnes Young).

[195] ICC Transcript, January 17, 2002 (ICC Exhibit 14b, p. 251, Agnes Young).

> MS. LICKERS: ... Stewart, you mentioned other men, the men you just mentioned, Bogaga.
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> MR. WASTESTE: Yes.
>
> MS. LICKERS: Who was he?
>
> MR. WASTESTE: That's my great-grandfather.
>
> MS. LICKERS: What do you remember people speaking about him, the stories about him? He lived at Turtle Mountain?
>
> MR. WASTESTE: Yes, he lived at Turtle Mountain.
>
> ...
>
> MS. LICKERS: Would he have been there when they surrendered the land or sold the land?
>
> MR. WASTESTE: He was there, yes, he was supposed to be there, that is what they said, they were there.[196]

Later, when asked by Commission counsel if Bogaga was living at Sioux Valley when the Turtle Mountain reserve was surrendered, Mr Wasteste replied, "No, I don't think so. What I understand is, no, they weren't. They never talked about that, but I think they were living over there until after the war."[197] At a minimum, Mr Wasteste's testimony corroborates the information in the written historical record, which suggests that Bogaga was living at Turtle Mountain at the time of the surrender.

In particular, the March 15, 1909, report that Agent Hollies sent to Commissioner Laird provides us with a benchmark for determining the "habitual residence" issue. At that time, there was no mention by either Agent Hollies or Hdamani that Bogaga was no longer living at Turtle Mountain reserve. It is most likely, given Hdamani's comfort with protest and voicing concern,[198] that if Bogaga no longer had residency at the Turtle Mountain reserve, and therefore no right to vote, Hdamani would have made this known through a third party or the Indian Agent. In addition, Indian agents from Markle to Hollies had reported the relocation of many of the members of Turtle

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[196] ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 19–20, Stewart Gordon Wasteste and Kathleen Lickers).

[197] ICC Transcript, December 7, 2001 (ICC Exhibit 14a, p. 76, Elder Stewart Gordon Wasteste).

[198] Chief Hdamani, Turtle Mountain Sioux, to Captain D.R. Cameron, Commissioner, International Boundary Commission, January 26, 1874, NA, RG 10, vol. 3607, file 2988 (ICC Documents, Exhibit 1, pp. 12–13); Chief Hdamani, Turtle Mountain Sioux, to unidentified recipient, April 1, 1893, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, p. 195); John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

Mountain reserve as they moved,[199] and there is little likelihood of Agent Hollies having failed to report to Ottawa the permanent relocation of a member he wrote about on several occasions.

It is also important to note that Bogaga's continuity of residency at Turtle Mountain extended from, at the latest, 1874[200] to April 28, 1909, when we have the first notice from Indian Agent Hollies that Bogaga was "living" at the Oak River reserve. It is evident from the historical record that he had regular residency at Turtle Mountain throughout this time.[201] In our view, this length of residency can accurately be called settled. It is also clear from the record that Bogaga maintained a house and stable at the reserve until after the date of the surrender.[202] It is also evident that, although Agent Hollies did not consider Bogaga to be staying at that time on the Turtle Mountain reserve, Bogaga was certainly not a resident of another reserve, in particular the Oak River reserve, nor is there evidence that he had applied to be a member of that reserve. On the balance of the evidence, no other inference can be drawn but that Bogaga was a continual resident of the Turtle Mountain reserve.

Based on the evidence, although there was a degree of continuity in Bogaga's residence at Turtle Mountain, there were temporary, occasional, and casual absences. For example, Agent Hollies reported that Bogaga visited Fort Totten reserve, North Dakota, in June 1908.[203] It is also possible, although not certain, that he was in Fort Totten with other Turtle Mountain families in June and July 1909, returning to Turtle Mountain on August 2, one week before the surrender vote.[204] The *Canard* standard speaks directly to the *quality* of residence on reserve and the existence of continuous residence, even given temporary, occasional, and casual absences. Based on the *Canard* standard, therefore, Bogaga's temporary, occasional, and casual absences would not have detracted from the fact of his continuity of residence on the Turtle Mountain reserve.

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[199] G.H. Wheatley, Indian Agent, Birtle Agency, to Secretary, Department of Indian Affairs, March 25, 1902, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 270); J.A. Markle, Indian Agent, Birtle Agency, to Indian Commissioner, Department of Indian Affairs, September 1, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 259); J.A. Markle, Indian Agent, Birtle Agency, to Secretary, Department of Indian Affairs, August 9, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 258); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908 (ICC Documents, Exhibit 1, pp. 291–98); J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 319–20); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, August 12, 1908, NA, RG 10, vol. 3869, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 321–25).

[200] Bogaga, Turtle Mountain, to Captain D.R. Cameron, Commissioner, International Boundary Commission, February 17, 1874, NA, FO 302/3, reel B-5320 (ICC Exhibit 12, pp. 55–56). In this letter, Bogaga's home is identified as Turtle Mountain, and it is likely he had been there for 12 years before this date; Chief Hdamani, Turtle Mountain, to Captain D.R. Cameron, Commissioner, International Boundary Commission, January 26, 1874, NA, RG 10, vol. 3607, file 2988 (ICC Documents, Exhibit 1, pp. 12–13). Chief Hdamani stated that he had been at Turtle Mountain for 12 years. Given the duration of their association, it is probable that Chief Hadamani and Bogaga resided in the same place during that time.

[201] ICC Transcript, December 7, 2001 (ICC Exhibit 14a, p. 231, Agnes Young; pp. 18, 20, S. Wasteste; p. 239, Agnes Young); John Thunder, Indian Missionary, to Indian Department, May 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 241); J. Hollies, Acting Indian Agent, Griswold Agency, to Indian Commissioner, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 313–16).

[202] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

[203] J. Hollies, Acting Indian Agent, Griswold Agency, to Indian Commissioner, Department of Indian Affairs, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 315).

It is true that Turtle Mountain was perceived to be a staging area where Sioux people celebrated and frequently crossed the international boundary. It does not follow from this fact, however, that Bogaga was not habitually resident at the Turtle Mountain reserve. Rather, his travel patterns reflected those of many Sioux people who maintained multiple residences according to the seasons. Both written and oral histories support this determination.[205] Seasonal patterns of attendance in different locations for different purposes do not detract from his enduring physical presence at Turtle Mountain. While there is evidence that Bogaga was periodically absent from Turtle Mountain, it does not establish that he had permanently moved from the reserve. For example, after his trip to the Fort Totten reserve in June 1908, he returned to the Turtle Mountain reserve. It is likely that Bogaga, like other Turtle Mountain Sioux, followed the yearly pattern of travelling to Fort Totten and returning home afterward.

There is no paper trail that allows us to ascertain exactly where Bogaga was at the operative time. In addition, some of Hollies' reports on Bogaga's whereabouts in the years following the surrender are inconsistent with the April 28, 1909, letter[206] suggesting instead that Bogaga made the transition from Turtle Mountain to Oak River in the period after the surrender. Thus, in order to make a final determination in the absence of clear, unequivocal evidence, we look again to the legal test for "habitually resident" summarized by the Commission in the *Duncan's First Nation Inquiry 1928 Surrender Claim* – namely, "the location to which that individual customarily returns" with "a sufficient degree of continuity" to be "settled," even with "temporary or occasional or casual absences," and "a regular presence which must endure for some time," with "the quality of residence being the overriding concern."[207]

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[204] J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

[205] George A. Hill to Captain D.R. Cameron, Commissioner, International Boundary Commission, May 18, 1874, NA, FO 5/1669, reel B-1153 (ICC Exhibit 12, pp. 69–71); Alexander Morris, Lieutenant Governor, Province of Manitoba & the NWT, to Minister, Department of the Interior, February 26, 1877, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 23–26); J.A. Markle, Indian Agent, Birtle Agency, to Superintendent General, Department of Indian Affairs, July 30, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896*, 142–51 (ICC Documents, Exhibit 1, pp. 216–25); ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 16 and 77, S. Wasteste; p. 32, Morris Kinyewakan; p. 47, Agnes McKay; p. 195, Philip HiEagle).

[206] See in particular J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, May 27, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Exhibit 1, pp. 458–59); J. Hollies, Indian Agent, Griswold Agency, to J.D. McLean, Secretary, Department of Indian Affairs, August 17, 1911, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 479–82).

As relocation of Turtle Mountain residents was a prime stated goal for Agent Hollies, he would most certainly have recorded the fact if Bogaga had initiated a permanent (by band transfer or other means) residence on another reserve. There is no evidence of Bogaga's consent to transfer or of any receiving band's acceptance, as there is for the previous relocations of families from Turtle Mountain in 1908. In addition, in correspondence from Agent Hollies dated April 28, 1909, to the Secretary of Indian Affairs, it is evident that Bogaga was present for the meetings to discuss a possible surrender when Hollies visited the reserve on March 11 and again on April 22 of that year.[208] Bogaga was also present at Turtle Mountain for the surrender meeting on August 6, 1909. We cannot infer, as the First Nation has done,[209] that Agent Hollies was exerting complete control over Bogaga at this time and that he was transporting Bogaga from the Oak River reserve to Turtle Mountain for the surrender discussions. There is simply no evidence to support this inference.

It is also worth noting that in the September 2, 1909, letter from John Hughes to the Minister of the Interior, approximately one month after the surrender vote, Hughes stated that Bogaga and Tetunkanopa had moved from Turtle Mountain and that each man had received money for doing so. This letter marks the first time, other than Hollies' April 28 letter, that Bogaga's relocation from the Turtle Mountain reserve is recorded in writing.[210]

Basing our analysis on *Canard* and *Adderson*, as summarized in the *Duncan's* report, we find that Bogaga customarily and usually returned to Turtle Mountain and that his quality of residence was such that he was habitually and ordinarily resident on the Turtle Mountain reserve. It is our determination that this pattern and his long-term residency at Turtle Mountain are sufficient to qualify Bogaga as "settled." In addition, Bogaga did not cease to be habitually resident despite "temporary or occasional or casual absences." It is evident from the written record that Bogaga maintained a regular physical residence on Turtle Mountain, even during the period in which the First Nation argues he had moved from Turtle Mountain to Oak River to live with his granddaughter.

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[207] ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 55 at 172–73.

[208] J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 319–20).

[209] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 15.

[210] John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

We also think that the duration of his residency at Turtle Mountain is just one factor to be observed in this assessment. Bogaga's adherence to Dakota traditions of temporary relocation,[211] his blindness and failing health,[212] his full participation in matters and decisions related to the reserve,[213] and respect for his decision to surrender the reserve are also relevant factors we have examined in making this determination. We have also taken into consideration his documented residency (1874–1909) and his probable residency (1862–1909) to find that Bogaga maintained habitual residence at Turtle Mountain for at least 35 (and perhaps 47) years. It is important that his entitlement not be disregarded in any event; we would be loath to interfere with a residence of this duration at Turtle Mountain.

The First Nation's counsel argues, however, that there is sufficient direct evidence in Indian Agent Hollies' April 28, 1909, letter referring to Bogaga's living at Oak River to establish that Bogaga was neither habitually resident on nor near the Turtle Mountain reserve.[214] Counsel also argues that inferences should be made that references to Bogaga's inability to cultivate land and his feeling of helplessness support his relocation to the Oak River reserve.[215] With respect, we do not agree with this submission. Although Bogaga may have left the reserve for health or other reasons occasionally, there is scant evidence on which to base a decision that he had left his continual residence before August 6, 1909.[216]

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[211] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908 (ICC Documents, Exhibit 1, pp. 291–98); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, August 1907, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, pp. 287–90).

[212] J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, January 31, 1908 (ICC Documents, Exhibit 1, p. 296); J. Hollies, Acting Indian Agent, Griswold Agency, to Indian Commissioner, July 2, 1908, NA, RG 10, vol. 3569, file 95, pt. 2 (ICC Documents, Exhibit 1, p. 315); J. Hollies, Acting Indian Agent, Griswold Agency, to the Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 369).

[213] J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 11, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 319–20); J. Hollies, Acting Indian Agent, Griswold Agency, to David Laird, Indian Commissioner, Department of Indian Affairs, March 15, 1909, NA, RG 10, vol. 3569, file 95, pt. 2A (ICC Documents, Exhibit 1, pp. 359–60); J. Hollies, Acting Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, April 28, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 367–69); Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, pp. 375–81).

[214] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

[215] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 14.

In conclusion, the Commission has a duty to decide where, on the face of the record before it and including both the documentary history and the oral testimony of elders, Bogaga habitually resided on August 6, 1909. The First Nation has not been able to point to any compelling evidence that would rebut the conclusion that Bogaga, a long-standing resident of the Turtle Mountain reserve, was an habitual resident anywhere but at Turtle Mountain when the surrender vote was taken.

We agree with Canada that the affidavit signed on August 9 by Tetunkanopa, certifying that "no Indian was present or voted at such council or meeting who was not a habitual resident on the Reserve,"[217] is persuasive of the fact of Bogaga's habitual residency. We also find that Bogaga likely changed his habitual residency to Oak River in the weeks following the surrender vote, given Hughes's letter of September 2, 1909, stating that Bogaga had moved with a sum of money to Oak River.[218] In reaching this decision, we accept the statement of Stewart Gordon Wasteste, Bogaga's great-grandson. Mr Wasteste, when asked whether Bogaga would have lived in Sioux Valley (Oak River) when the reserve was surrendered, stated that his understanding was that Bogaga lived at Turtle Mountain at the time of the surrender.[219]

It is reasonable to assume that Bogaga maintained his habitual residence at Turtle Mountain until some time after August 6, 1909, and was therefore entitled to vote on the surrender. To conclude otherwise would be tantamount to effecting a disentitlement of a member of the Band from the expression of his will, a finding we would not support, given the grave importance of a vote to surrender reserve lands.

Our finding that Bogaga was habitually resident on the Turtle Mountain reserve during the relevant period obviates the need to examine the alternative requirement of section 49(2) of the *Indian Act* – that the voter be habitually resident at a place "near" the reserve in question.

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[216] John E. Hughes to Minister, Department of the Interior, September 2, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

[217] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1(ICC Documents, Exhibit 1, p. 378).

[218] John E. Hughes to Minister, Department of the Interior, 2 September 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 388–89).

[219] ICC Transcript, December 7, 2001 (ICC Exhibit 14a, pp. 17–18, Stewart Gordon Wasteste).

Was Bogaga Interested in the Reserve?

The 1906 *Indian Act* also required that, in addition to having a habitual residence on or near the reserve, an Indian would be entitled to vote on a surrender of reserve lands only if he were "interested in the reserve in question."[220] The First Nation did not raise this statutory requirement as an issue, assuming no doubt that Bogaga retained an interest in Turtle Mountain regardless of the place of his habitual residence. Nevertheless, for clarity, we shall comment on this requirement in the context of Bogaga's entitlement to vote.

As this Commission determined in the *Duncan's First Nation Inquiry 1928 Surrender Claim*:

> [I]t must be recognized that the words "interested in" are intended to ensure the participation of those band members who have a *reasonable connection* – whether residential, economic, or spiritual – with the reserve. What constitutes a reasonable connection will clearly vary depending on the circumstances of a given case, and therefore it would not be wise or even necessary for us to attempt to enumerate all the criteria that might be considered to give rise to such a connection. Generally speaking, we would err on the side of inclusion, and we would observe that it is *only those individuals who have little or no connection with the reserve who should be excluded from voting on the surrender of reserve lands*.[221]

For all the same reasons that we found Bogaga habitually resident at Turtle Mountain reserve, we find that he was interested in the reserve. By this standard, Bogaga must have had a reasonable connection to the Turtle Mountain reserve in order to vote on its surrender. Given Bogaga's long-term residency at Turtle Mountain, his continued presence at and link to the reserve (as established by his ongoing attendance at Hdamani's house in surrender discussions), and the lack of protest by Hdamani at Bogaga's participation in the surrender vote, it is certain that Bogaga had a reasonable connection to the Turtle Mountain reserve.

We also find it worthwhile to mention that the improvements that Bogaga made to the reserve in the form of a house, a stable, and cultivated lands clearly demonstrate an interest in the Turtle Mountain reserve.[222] These undisputed facts place Bogaga in a category beyond "little or no connection with the reserve," and he was rightly included in the voting on the surrender of the reserve lands.[223]

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[220] *Indian Act*, RSC 1906, s. 49(2).

[221] ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 55 at 165–66. Emphasis added.

[222] J. Hollies, Indian Agent, Griswold Agency, to Secretary, Department of Indian Affairs, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 384).

Issue 2(b) Was the Band's Assent to the Surrender Properly Certified?

Were the requirements of the *Indian Act*, and in particular section 49(3) in terms of completion of the affidavit, properly complied with, i.e., was the assent by the Band certified on oath by some of the Chiefs or principal men present at the meeting and entitled to vote?

The primary issue between the parties is whether the certification by *one* principal man, Tetunkanopa, instead of *some* principal men, was in compliance with section 49(3) of the *Indian Act*, and, if not, whether non-compliance with this section invalidates the surrender.

Section 49(3) of the1906 *Indian Act*, RSC 1906, c. 81, reads as follows:

> 49(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, *and by some of the chiefs or principal men present thereat and entitled to vote* ...[224]

The surrender document and the affidavit are dated August 9, 1909. The surrender is signed by the marks of Bogaga, Tetunkanopa, and Charlie Tetunkanopa. It provides in part:

> THAT WE, the undersigned ["Chief and" struck out] Principal men of The Turtle Mountain Band of Indians resident on our Reserve No. 60, at Turtle Mountain in the Province of Manitoba and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up ... that certain parcel or tract of land and premises, situate lying and being in the Turtle Mountain Reserve, No. 60 in the Province of Manitoba containing by admeasurement six hundred and forty acres be the same more or less and being composed of the whole of the said Turtle Mountain Reserve No. 60.
>
> ...
>
> AND WE the said ["Chief and" struck out] Principal men of the said Turtle Mountain Band of Indians do on behalf of our people and for ourselves hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may

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[223] We will further address the question of "interested" members in our analysis of section 49 of the 1906 *Indian Act* later in this report.

[224] *Indian Act*, RSC 1906, c. 81, s. 49(3). Emphasis added.

> do, or cause to be lawfully done, in connection with the sale of the said land and the disposition of the moneys arising therefrom.
>
> ...
>
> Signed Sealed and Delivered in the presence of
> (sgd) Charles Elvingston Stevens – Chief of Police
> (sgd) Bogaga his X Mark
> (Sgd) Tetunka-Nopa his X Mark
> (Sgd) Charlie Tetunka Nopa his X Mark[225]

Attached to the surrender document is an affidavit dated August 9, 1909, sworn by J. Hollies and Tetunkanopa before T.K. Spence, JP, Deloraine, Manitoba.[226] One of the two signatories to the affidavit, Tetunkanopa, certified:

> That the annexed Release of Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.
>
> That such assent was given at a meeting of council of the said Band of Indians summoned for that purpose, according to its Rules, and held in the presence of Tetunkanopa.
>
> That no Indian was present or voted at such council or meeting who was not a habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.
>
> That he is ["a Chief" struck out] of the said Band of Indians and entitled to vote at the said meeting or council.
>
> SWORN before me by the Judicial Deponent and Judicial agent at the Village of Deloraine in the County of Brandon this 9th day of August A.D., 1909.
>
> (sgd) TK Spence JP
>
> ...
>
> (sgd) Tetunka-nopa his X mark

In the same document, the other signatory to the affidavit, Agent Hollies, also attested to a number of statements confirming the surrender's compliance with the provisions of the *Indian Act*.

Agent Hollies' report to the Secretary of Indian Affairs on August 12, 1909, illustrates that the arrangements for signing the surrender document and affidavit following the vote on August 6, 1909, were not without practical difficulties:

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[225] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 375–81).

[226] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 378).

> Immediately afterwards, Bogaga, with Tetunka-nopa and his son Charlie, proceeded to Deloraine to sign Surrender papers, and Tetunka-nopa to make Affidavit as required with myself and as Bogaga is blind. But here at Deloraine, and within reasonable distance, was not to be found A competent person such as the Indian act requires before whom I with Tetunka-nopa, could certify on oath, that such "Surrender" had been assented to by the band; and finally had to be deferred till the 9th, when I could secure a J. P. from Medora to visit Deloraine for that purpose.[227]

From this report, it is evident that Hollies, for one, did not question the propriety of having only one principal man, Tetunkanopa, sign the affidavit. In order to know whether Hollies complied fully with the statutory requirements, however, we shall first determine if the word "some" in section 49(3) can mean "one," to ascertain whether the certification by one principal man of the Turtle Mountain Band was sufficient to be in compliance with the *Indian Act*.

Canada's counsel submits that the terms of the Act were fulfilled by the affidavit sworn by Tetunkanopa. Canada refers to the definition in the *Concise Oxford English Dictionary*[228] of "some" as "an unspecified amount or number of" and argues that, if the language is construed on its plain meaning, "the singular is included in the definition of 'some.'"[229] Tetunkanopa is "some" of the principal men, according to Canada, and therefore the "directive for certification, on oath, by one or more of the chief or principal men of the band was fulfilled by the one affidavit sworn by Tetunkanopa on August 9, 1909."[230]

In contrast, the First Nation's position is that "the requirement that the certification be made 'by *some* of the Chiefs or principal men present thereat and entitled to vote' is not complied with by the certification of Tetunka-nopa alone."[231] In particular, the First Nation relies on the specific instructions given to Agent Hollies by Deputy Superintendent General Frank Pedley to support its argument that at least two principal men should have signed the affidavit:

> On September 3, 1908, Agent Hollies was instructed by Mr. Pedley to take a Surrender "under and in accordance with the provisions of the *Indian Act*", and, in

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[227] J. Hollies, Indian Agent, to Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–83).

[228] *Concise Oxford English Dictionary*, 10th ed. (Oxford: Oxford University Press, 1999).

[229] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 18.

[230] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 18.

[231] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 23.

> particular, he was to make an Affidavit of Execution along with "two of the principal men".[232]

We note, however, that the September 3, 1908, letter from Mr. Pedley was advice in anticipation of the proposed surrender and was not as strictly stated as his June 16, 1909, letter to Agent Hollies. This letter was instructive and directly related to an actual surrender, not a *proposed* one. Pedley's instructions to Hollies this time were as follows:

> I enclose forms of surrender, duly amended, as requested, which you are hereby authorized to submit to the Indians under and in accordance with the provisions of the Indian Act.[233]

In other words, the advice given nearly a year before the surrender meeting was not repeated in the instructions given two months before surrender. These latter instructions indicate only that the surrender be in compliance with the *Indian Act*.

Because of the lack of jurisprudence on the interpretation of the word "some" in section 49(3) of the *Indian Act*, we find it necessary to seek further guidance from both the facts surrounding the surrender vote and the case law that is relevant to understanding the objective of the certification requirements.

With respect to the facts:

- There is a strong evidentiary trail that points to the intentions of the voters having being accurately represented in the vote. The preliminary surrender discussions with the Band, as outlined in Hollies' reports of March 15 and April 28, 1909, in particular the record of those favouring and those opposing surrender, are consistent with the report of the surrender meeting on August 6 and the surrender document of August 9.
- As stated by Canada's counsel, there was no subsequent dispute related to the vote,[234] nor was there a later dispute over the intentions of the voters or the certification by Tetunkanopa and Hollies.

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[232] F. Pedley, Deputy Superintendent General of Indian Affairs, to J. Hollies, Acting Indian Agent, September 3, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 328), in Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 21.

[233] F. Pedley, Deputy Superintendent General of Indian Affairs, to J. Hollies, Indian Agent, June 16, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 374).

[234] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 18.

- There were only five voting members of the band, three of whom (Bogaga, Tetunkanopa, and his son Charlie Tetunkanopa) voted in favour of the surrender. One out of the three voters assenting to the surrender signed the affidavit.

- Agent Hollies' report suggested that only Tetunkanopa was to sign the affidavit on behalf of the Band "as Bogaga is blind."[235]

We have no written evidence to establish why Tetunkanopa's son Charlie did not sign the affidavit. Hollies' report[236] is silent on the question of Charlie's eligibility. Canada suggests that the lack of Charlie's signature may be due to the fact that "the agent did not consider Charlie to be a 'principal man', since he was only 22 years old and his father was still alive."[237] The term "principal men" in section 49(3) of the *Indian Act* has not, to our knowledge, been defined in the jurisprudence, nor have the parties sought to make submissions on its meaning. We note, however, that Charlie Tetunkanopa was considered a principal man for the purpose of voting on the surrender, as evidenced by the wording of the document, "WE, the undersigned ['Chief and' struck out] Principal men." Moreover, section 49(1) of the *Indian Act* simply requires that voters on a surrender be male *band members* over the age of 21 years.[238] Finally, we note that there was no recorded concern voiced at the surrender meeting or subsequently that any of the voters was not a principal man. Without more guidance, we are able to infer that, at least for the purpose of a surrender vote, a male band member over 21 was considered a principal man. As such, Charlie Tetunkanopa, aged 22, was a principal man and could have signed the affidavit. That he did not, however, is in no way conclusive of the question as to whether the requirements of section 49(3) were met.

In addition to the facts, a number of cases and Commission inquiry reports provide further guidance in determining whether Agent Hollies complied with the Act in obtaining only one signature of a principal man on the affidavit.

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[235] J. Hollies, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 382).

[236] J. Hollies, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, August 12, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 382–84).

[237] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 19.

[238] *Indian Act*, RSC 1906, s. 49(1).

In the context of a surrender, the Supreme Court of Canada in *Blueberry River Indian Band v. Canada*[239] (referred to as the *Apsassin* case throughout this report) specifically discussed the objective of the certification requirements. With respect to the true object of the 1927 *Indian Act* provisions (which correspond to section 49(3) of the 1906 Act), the Court stated:

> *The true object ... was to ensure that the surrender was validly assented to by the Band ... Moreover, to read the provisions as mandatory would work serious inconvenience*, not only where the surrender is later challenged, but in any case where the provision was not fulfilled, as the Band would have to go through the process again of holding a meeting, assenting to the surrender, and then certifying the assent. I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory.[240]

Canada argues, and we agree, that this case stands for the proposition that substantial compliance with the technical requirements of the Act is sufficient to confirm a valid surrender "as long as the evidence clearly indicates the valid assent of the Band members."[241] Substantial compliance is further confirmed if the true intention of the band members can be assessed by review of their knowledge of the surrender and its consequences – in other words, that they were giving up forever their rights to the reserve land.[242]

In the *Kahkewistahaw First Nation 1907 Reserve Land Surrender Claim Inquiry*,[243] the Commission reviewed the statement by Killeen J in *Chippewas of Kettle and Stony Point v. Canada*[244] to the effect that band consent to a surrender that would otherwise be valid cannot be nullified by an evidentiary proviso that provides sworn proof that the surrender provisions in section 49(1) and (2) were met. The Commission went on to state that section 49(3) merely confirms that what took place at the surrender vote complied with the stringent requirements of the *Indian Act*. Further, stated the Commission, if the results of a surrender vote could be struck down only because of a failure to follow exactly the technical requirements of certification in section 49(3), the object of the legislation – to ensure that the surrender was validly assented to by the Band – would be undermined.[245]

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[239] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

[240] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 374–75 (SCC) McLachlin J, as quoted in the Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 20. Emphasis added.

[241] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 20.

[242] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

[243] ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

[244] *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 691–92, aff'd (1996) 31 OR (3d) 97 (CA).

The caselaw is clear that section 49(3) is directory, not mandatory, and, as such, the failure to meet the requirement of the subsection would not nullify the result of a surrender vote that is otherwise valid. We have already found that Bogaga was habitually resident at Turtle Mountain reserve at the time of the surrender vote. Therefore, the validity of the surrender is confirmed on that basis. If, as we discuss below and as the First Nation argues, the Crown breached its fiduciary obligations by engaging in tainted dealings or otherwise, the validity of the surrender would be seriously in question. In this situation, if there were a failure to meet the technical requirements of the section 49(3) certification, the weight given to the affidavit as direct evidence of compliance with the surrender requirements would be greatly diminished, as the First Nation argues.[246]

Barring such a finding, however, the Commission is persuaded on the facts and the applicable law that Agent Hollies was in compliance with both the technical requirements and the objective of section 49(3). On balance, we find that "some" principal men can, by definition, mean "one" principal man. Both the plain meaning of the words of section 49(3) and the undisputed objective of the affidavit – to ensure a surrender validly assented to by the band – support this interpretation.

We are further persuaded that, even if other options were available, it was reasonable on the facts of this case for Agent Hollies to obtain only one signature. It could even be argued that "some" is little more than a question of fact to be determined by the circumstances of each case. Here, the Commission finds that "some" of the principal men included the possibility of "one," given the small number of principal men, the accordance of the vote with the previously stated intentions of the principal men, and Bogaga's blindness.

We wish to comment here on the First Nation's assertion that Bogaga's blindness was not a reasonable justification to excuse him from signing the affidavit.[247] The fact that Bogaga signed the surrender document in Deloraine on August 9, 1909, and not the affidavit on the same day, does not reasonably lead to the inference, as argued by the First Nation, that Bogaga did not do so because it "would require him to depose the facts which he knew to be false, namely the paragraph attesting to the fact 'that no Indian was present or voted at such Council or meeting, who was not a habitual resident on the Reserve of the said Band.'"[248] In the absence of any supporting evidence and given that we have already found that Bogaga was habitually resident on reserve, we do not find it necessary to address this argument.

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[245] ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 70.

[246] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 27.

[247] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 23.

With Bogaga's blindness considered by Hollies to be a problem, with Hdamani and Chaske ineligible to sign the affidavit, given the wording in the document ("That the annexed Release or Surrender was assented to by him"),[249] and with no information as to why Charlie Tetunkanopa did not sign, we find that, in these circumstances, the attestation requirement was fulfilled by having Tetunkanopa alone sign the affidavit.

The facts of this case require that we ensure that legislation which anticipated a larger number of voters does not have a negative impact on the relatively small number of voters present at this surrender meeting. In other words, process should have a minimum impact on substance. In this instance, there were three voters in favour of surrender and two against. It is significant that 60 per cent voted in favour, and, in this situation, one of the assenting voters (20 per cent) signed the affidavit. In the absence of additional information that would raise a serious question as to why only one signed the affidavit, the Commission concludes that the reasonable interpretation is the one that best reflects the will of the voters. In this instance, it seems reasonable and fair to have one voter sign the affidavit. If Agent Hollies made an error in assessing the capacity of one of the voters to sign an affidavit, that error belongs to process and not to the substance of the decision made by the voters.

Although not raised by either party, we note that the English version of section 49(3) situates the word "some" before the words "chiefs or principal men." In most surrender situations, there is only one chief, not some chiefs, and it would be illogical in this context to define "some" as "two or more." Furthermore, the French version of section 49(3) of the 1906 *Indian Act*, reads as follows:

> Le fait que la cession ou l'abandon a été consenti par la bande à ce conseil ou assemblée doit être attesté sous serment, par le surintendant général ou par le fonc-

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[248] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 26, 2002, p. 23.

[249] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 375–81).

> tionnaire autorisé par lui à assister à ce conseil ou assemblée, *et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote ...*[250]
>
> [Translation
> 49(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, *and by one of the chiefs or principal men present thereat and entitled to vote ...*[251]]

The use of the singular noun "l'un" and the singular verbs "a assisté" and "a droit" in the French version further supports the argument that the signature of one chief or one principal man on the affidavit is all that the Act requires.

In summary, the Commission is satisfied that the statutory requirement that the affidavit be signed by "some of the chiefs or principal men present thereat and entitled to vote" was met. As a question of statutory interpretation, we find that "some" can equal "one" and, in this case, it did. Furthermore, in the appropriate circumstances, as here, it was both reasonable and consistent with the caselaw to have only one principal man attesting to the validity of the Band's assent to the surrender. To find otherwise on these facts would be to undermine the will and the autonomy of the majority of the voters.

Issue 2(c) Is the Surrender Invalid?

If the Band's Assent to the Surrender Was Not Properly Certified, Is the Surrender Invalid?

The Commission has found that the surrender of reserve lands by the Turtle Mountain Band of Indians on August 6, 1909, accorded with the provisions of the *Indian Act* of 1906. It is therefore unnecessary to answer this question.

ISSUES 3–5 DOES CANADA HAVE AN OUTSTANDING LAWFUL OBLIGATION TO THE FIRST NATION?

What duties and obligations, fiduciary or otherwise, if any, did Canada owe to the Band in relation to the interests of the Band and its members in the taking of reserve lands by way of surrender?

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[250] Loi des sauvages, RSC 1906, c. 81, par. 49(3). Emphasis added.

[251] This is not the official English version, which can be found on page 63; the words underlined are a literal translation of words used in the French version of the 1906 *Indian Act*. Emphasis added.

Did Canada fail to fulfill any of the said duties or obligations to which it was subject?

If Canada failed to fulfill any of such duties or obligations, is said conduct by Canada sufficient to render void the Surrender of 1909 or to result in Canada's having an outstanding lawful obligation to the First Nation in respect of the taking of reserve lands?

Our mandate under the Specific Claims Policy is to determine whether an outstanding lawful obligation is owed by Canada to the Canupawakpa Dakota First Nation. Although we have concluded that the surrender was taken in accordance with the procedures set out in the 1906 *Indian Act*, an outstanding lawful obligation may nevertheless be grounded in Canada's breach of its fiduciary duties to the First Nation. We now turn to our analysis of the fiduciary duties, if any, owed by Canada to the Canupawakpa Dakota First Nation on the facts of this case.

We begin with a review of the Supreme Court of Canada's decisions in *Guerin v. The Queen*[252] and in *Apsassin [Blueberry River Indian Band v. Canada]*.[253]

The *Guerin* Case

In *Guerin*, the Supreme Court of Canada dealt with the Musqueam Band's 1957 surrender of 162 acres of its reserve land to the Crown. This land was surrendered for the purpose of leasing the land to the Shaughnessy Golf Club, on the understanding that the lease would contain the terms and conditions presented to and accepted by the Band Council. The surrender document required the Crown to lease the land on such terms as it deemed most conducive to the welfare of the Band. Subsequently, however, the Band discovered that the lease did not give effect to the understanding reached between the Band Council and the Crown. In fact, the terms were much less favourable to the Band than as agreed.

All eight members of the Court found that the Crown owed a legal duty to the Band in relation to the surrender and that this duty had been breached. However, three sets of reasons for judgment were rendered, disclosing different conceptions of the nature of this duty. On behalf of the majority of the Court, Dickson J (as he then was) wrote:

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[252] *Guerin v. The Queen*, [1984] 2 SCR 335.
[253] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344.

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act
>
> ...
>
> [W]here by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[254]

Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case.... The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2)."[255] As we said in the *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* during a similar review of the *Guerin* case, "fiduciary principles will always bear on the relationship between the Crown and Indians, but, depending on the context, a fiduciary duty may be narrowed because the Crown's discretion is lesser and a First Nation's scope for making its own free and informed decisions is greater."[256]

In the Moosomin inquiry, as here, section 49(1) of the 1906 *Indian Act* is an example of such narrowing: although reserve land is held by the Crown on behalf of a band, it may not be surrendered except with the band's consent. It is this "autonomy" to decide how to deal with reserve land that the Supreme Court of Canada considered in *Apsassin*, an issue to which we now turn.

The *Apsassin* Case

In *Apsassin*, the Court considered the surrender of reserve land by the Beaver Indian Band, which later split into two bands now known as the Blueberry River Band and the Doig River Band. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the Band made a living from trapping and hunting farther north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. In 1945, the Band was approached again, to explore the surrender of the reserve to make the land available for returning veterans of World War II interested in taking up agriculture.

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[254] *Guerin v. The Queen*, [1984] 2 SCR 335 at 383–84.

[255] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387.

[256] ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 180.

After a period of negotiations between the Department of Indian Affairs (DIA) and the Director, Veterans Land Act (DVLA), the entire reserve was surrendered in 1945 for $70,000. In 1950, some of the money from the sale was used by the DIA to purchase other reserve lands closer to the Band's traplines farther north. After the land was sold to veterans, it was discovered that it contained valuable oil and gas deposits. The mineral rights were considered to have been "inadvertently" conveyed to the veterans, instead of being retained for the benefit of the Band. Although the DIA had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovery of these events, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land "undervalue."

In several of its previous inquiries involving allegedly wrongful surrenders and, most recently, in the *Duncan's First Nation* claim,[257] the Commission has conducted an extensive examination of the *Apsassin* decision. Although this analysis will not be repeated in detail, it is useful to restate that the Court in *Apsassin* not only confirmed that Canada must conduct itself according to the high standards required of a fiduciary in its dealings with a band before the taking of a surrender but also set out the principles by which it should be determined whether that duty has been met. As we have stated in previous reports, the Court's comments on the question of pre-surrender fiduciary obligations may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former obligation concerns whether the context and process involved in obtaining the surrender allowed the Band to consent properly to a surrender under section 49(1) of the *Indian Act* and whether its understanding of the dealings was adequate. In the following analysis, we shall first address whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown. We shall then consider whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected.

The substantive aspects of the Supreme Court of Canada's comments relate to whether, given the facts and results of the surrender itself, the Governor in

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[257] ICC, *Duncan's First Nation Inquiry 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 53.

Council ought to have withheld its consent to the surrender because the transaction was foolish, improvident, or otherwise exploitative. In their written submissions, counsel for Canada and counsel for the Canupawakpa Dakota First Nation framed their arguments regarding Canada's fiduciary duties, if any, around either the *context* of the surrender, as the First Nation argues, and/or around the substantive *result* of the surrender, as Canada argues. We shall address each in turn.

The Context of the Surrender: Inadequate Understanding

In his judgment for the majority in *Apsassin*, Justice Gonthier wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."[258]

In Canada's response to the Canupawakpa Dakota First Nation's written submission, it admits of certain duties in the process of taking a surrender. First, Canada acknowledges a duty to ensure statutory compliance. As we have previously addressed the issue of statutory compliance, it will not be necessary to repeat this analysis except to restate that, since the statutory provisions of the *Indian Act* give the band the power to decide for or against a surrender, the band's decision must be respected unless the conduct of the Crown has made it unsafe to rely on that decision. Instead, we shall consider Canada's second admitted duty – namely, to ensure that the Band's decision to surrender land is an informed one. Canada submits that there are a number of factors which are relevant to determining whether the consent was based on adequate information. These factors include "whether the voters had discussed the matter fully, both at the [surrender] meeting and amongst themselves, whether they understood the consequences of the transaction even though they might not have fully understood the precise legal nature of the interest they were surrendering, and the conduct of departmental representatives."[259]

Canada submits that the Band had ample opportunity to make an informed and considered decision. Beginning in the 1870s and before a reserve was surveyed at Turtle Mountain, the Crown expressed a desire for the Turtle Mountain Band to settle on other Sioux reserves. Soon after the Department of Indian Affairs had decided to allow the Turtle Mountain Band to remain

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[258] *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344 at 362 (SCC), Gonthier J.

[259] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 25.

"during good behaviour" at Turtle Mountain, the question of surrender and transfer to other bands was raised. Agent Markle pursued this goal after 1889 until he left the agency in 1898. Following a period of relative inactivity over the matter of surrender, Agent Hollies again brought the issue to the Band in 1908. At that time, he reported that both Hdamani and Bogaga were opposed to surrender. Hollies again brought the matter of surrender forward in March and April 1909. The surrender itself was not taken until August 1909. In Canada's view, the cumulative effect of each successive attempt to seek a surrender resulting in repeated refusals can only mean that the Band "had a significant period of time and opportunity to consider the issue of surrender and to obtain information regarding the consequences."[260]

Canada also cites Hollies' reports of March 15, 1909, and April 28, 1909, as clear authority that the consequences of surrender were explained to the voters of the Turtle Mountain Band. Further, Hollies' notes in his April 28, 1909, report and his notes of the surrender meeting itself indicate that, at a minimum, an interpreter was present. The proof that the voters understood that the land was to be sold and that they would receive the proceeds of sale is evidenced, in Canada's view, by at least one voter, Bogaga, and his February 1910 request for an advance on his share of the proceeds.[261]

The Band, says Canada, understood that it would no longer have any right to live at Turtle Mountain after the surrender, since the issue of the necessity to transfer to other reserves after the surrender was a significant part of Hollies' discussion with the elder voters. Further, they knew from discussions with Hollies and from the terms of the surrender document itself[262] that they would receive proceeds of sale, including compensation for their improvements.

Although it is clear that some aspects of the Band's understanding are not directly in evidence, Canada argues that, taken together, all these circumstances would have ensured that the Band's decision was made without haste, with full opportunity to discuss it among themselves and with the Indian Agent, and with an adequate understanding of the consequences of the surrender. In the result, the consent was valid.[263]

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[260] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 21.

[261] J. Hollies, Indian Agent, to the Secretary, Department of Indian Affairs, February 7, 1910, NA, RG 10, vol. 3644, file 7785-1 (ICC documents, Exhibit 1, p. 402).

[262] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 375–81).

[263] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 22.

The First Nation does not address the Turtle Mountain Band's understanding of the terms of surrender in any detail in either its written submission or in argument, except to state that the "surrender" purportedly taken by Canada "really did not evidence the intent and free consent of the First Nation."[264] We have taken this to mean that the "intent and free consent" of the Band is evidenced, according to the First Nation, by its repeated refusals to leave the reserve during Agent Markle's time in the 1890s and by its refusal to surrender when the plan was first presented by Agent Hollies in 1908, but not by its final decision on August 6, 1909.

We also find it curious that the First Nation, in its submission, addresses the result of the 1909 surrender on the Band when it states that "the result would be not only the release by the Band of all its reserve lands but, in effect, the loss of the Band's identity,"[265] but it does not develop this argument by reference to the evidence or lack thereof. Nor is it clear whether the First Nation considers that a failure on the part of the Crown to explain to the Band that a surrender of the reserve would result in a loss of the Band's identity would constitute a breach of the Crown's fiduciary obligations.

Nevertheless, having reviewed the parties' different approaches to the Band's understanding of the terms of surrender, we agree with Canada's characterization of this issue – that the most critical question the Commission must ask itself in consideration of this claim is "whether there is anything in this record that leads [it] to conclude, on balance, that the consent was less than informed and voluntary?"[266] We shall address the voluntariness of the Band's consent to surrender later in this report when we consider "tainted dealings." At this point we shall summarize the information and understanding of the Band with regard to the surrender.

Based on the written record, we know that Agent Hollies reported in November 1908 that "the feeling and talk [among the Turtle Mountain membership] has been strongly against the surrender of the Reserve."[267] By March of the following year, Hollies met again with the three remaining senior members of the Band: "[E]ach man is over 65 years, and incapable of farming any of the 640 acres, and all three are on the ration list."[268] By April

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[264] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 65. In fact, the First Nation offered no written reply.

[265] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 88.

[266] ICC Transcript, October 22, 2002, and November 15, 2002, p. 138 (Uzma Ihsanullah).

[267] J. Hollies, Acting Indian Agent, to the Secretary, Department of Indian Affairs, November 20, 1908, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 339).

[268] J. Hollies, Acting Indian Agent, to D. Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95-2A (ICC Documents, Exhibit 1, p. 359).

1909, Hollies met again with the members of Turtle Mountain and reported that "it was the question of How they were going to cultivate lands this year, and the knowledge of their incapacity and feeling of helplessness, that brought the question of surrender of the reserve, so strongly to their attention, and finally after many hours to their adoption."[269] We also know that it was another five months, in August 1909, before Hollies reassembled the members for a vote. We can only assume that, within this five-month period, there would have been further discussion regarding the matter of surrender. According to the actual surrender document, what would have been understood by the members at the time of the August 6, 1909, vote was that they were giving up all rights to the Turtle Mountain IR 60 and would be entitled to a share in the surrender proceeds. We also know that an interpreter was present that day, and we can assume that he would have translated the terms of the surrender agreement. Moreover, we know that Agent Hollies was anxious for the members to relocate to other Sioux reserves, even though the surrender document is silent as to their relocation.

Based on the totality of the evidence, we are satisfied that the remaining members of the Turtle Mountain Band who voted on August 6, 1909, understood that they were forever giving up their rights to IR 60, that they would have to relocate, and that they would receive the benefit of the sale of these lands. Their understanding of these terms was adequate. Canada has demonstrated that it conducted itself with the required diligence, and we therefore do not find Canada to be in breach of this fiduciary duty.

Abnegation of Decision-Making Power

The First Nation referred the Commission panel to the Commission's decision in *Kahkewistahaw* and its analysis of McLachlin J's reasons in *Apsassin* concerning the Crown's fiduciary obligations in the pre-surrender context – in particular, the portion of the report that dealt with circumstances where a band's decision-making authority may be ceded or abnegated. In *Kahkewistahaw*, the Commission said:

> We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to

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[269] J. Hollies, Acting Indian Agent, to D. Laird, Indian Commissioner, March 15, 1909, NA, RG 10, vol. 3569, file 95-2A (ICC Documents, Exhibit 1, p. 368).

> have been ceded or abnegated. The mere fact that the band had technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated only when a band has completely relinquished that power in form as well as in substance, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred.[270]

In this case, the First Nation argues that, by August 6, 1909, Canada's depopulation of the Turtle Mountain reserve had resulted in reducing the effective voting members to three. One of the members, Bogaga, "the swing vote," was a blind, destitute person "under the care and influence of the Indian Agent Hollies." In addition, the First Nation argues, Hollies had such absolute control over the timing and location of the surrender vote that he could guarantee a positive vote. From his original instructions to seek a surrender on March 23, 1908, Hollies had, "on every opportunity where a surrender vote would have been unsuccessful, refused to implement those instructions, choosing to await an opportunity where success was guaranteed." In such circumstances, the First Nation argues, the Band lacked the capacity to exercise its autonomy or to exert any measure of control over the surrender process. The voting members were, in effect, "pawns under the control of Indian Agent Hollies." In this way, the First Nation submits, the Turtle Mountain Band abnegated its decision-making authority to the Crown in the person of Agent Hollies and, in these circumstances, the Crown "must be burdened with a fiduciary obligation to act conscientiously and in the best interests of the Band."[271] Its failure to meet its fiduciary duty and act "conscientiously" should therefore result in a finding that the surrender is invalid.

In response, Canada submits that a surrender is not invalid simply because it is one that the Crown favours, provided that the assent of the band is obtained in accordance with the law. In this case, the Department of Indian Affairs had, quite openly and for valid reasons, long wanted a surrender of Turtle Mountain IR 60. However, Canada submits, the department equally acknowledged that the decision to surrender lay with the Band.[272] Further, the Crown's concerns about Turtle Mountain had existed for over 50 years before the surrender and were made known to the Band. Canada's

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[270] ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 87.

[271] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, pp. 87–88.

[272] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 26.

"legitimate policy and operational concerns" included the proximity of the reserve to the international border and the distance of the reserve from the Agency, a distance that made the delivery of services "inconvenient." Nevertheless, Canada argues that, despite the determination of the two key Indian Agents, Markle and later Hollies, both were instructed to use only acceptable methods of persuasion. Further, Canada submits, Markle's more aggressive tactics were not sanctioned by the department's senior officials, and he was immediately instructed to desist once his strategy became known.

As regards the relocation of members to other bands, Canada submits there is no evidence indicating that Markle's failure to give assistance in 1891 (some 18 years before the surrender vote) actually forced anyone to leave the Turtle Mountain reserve. When, later that spring, three families moved to Oak Lake, Markle did not initiate the transfer but merely facilitated it once he became aware of the families' willingness to relocate. In any case, Canada submits, the relocations occurred with the consent of the families involved and the band to which they moved.

As no action was taken regarding the proposed surrender from the time of Agent Markle's departure in 1898 to Agent Hollies' arrival in 1908, Canada submits, it is entirely unsupportable to suggest that departmental officials conducted a "relentless twenty-year campaign to obtain a surrender of Turtle Mountain."[273] Finally, Canada argues there is no evidence that Hollies used any means that were not legitimate in the period from his November 1908 report to the March 1909 meeting at which Bogaga and Tetunkanopa decided to surrender the reserve. Rather, Hollies' strategy seems to have been to wait patiently and use the power of persuasion when appropriate: "[H]e had well in mind the ultimate government requirement which was consent of the band."[274] In Canada's view, Hollies was confident that the band members would eventually change their minds – including Hdamani, once he had received the advice of the Indian Commissioner.

We are in agreement with Canada that there is no evidence to support the assertion that the Turtle Mountain Band abnegated its decision-making authority to Indian Agent Hollies. Even Hdamani, who said at one point that he would follow the advice of the Indian Commissioner, chose ultimately to do the opposite, and his decision was respected in the final result.

We are nonetheless mindful that the First Nation has also focused its argument on the context of surrender and of "tainted dealings" in order to argue that any expression of consent by the Turtle Mountain Band was vitiated by the conduct of the Crown. We shall now turn to this element of *Apsassin*.

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[273] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 30.

[274] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 32.

Tainted Dealings and/or an Exploitative Bargain

On the one hand, the First Nation has focused its analysis of *Apsassin* and the facts of this case on Gonthier J's reasons that he would be "reluctant to give effect to a surrender if the conduct of the Crown had somehow tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention."[275] Canada, on the other hand, has chosen to focus its analysis on McLachlin J's reasons in *Apsassin*, as discussed previously in this report, that the provisions of the *Indian Act* and the nature of the relationship between Canada and the Indians give rise to a fiduciary duty on the Crown, and more specifically the Governor in Council, to withhold its consent to a surrender where the band's decision to surrender was, to use the words of McLachlin J, "foolish or improvident – a decision that constituted exploitation."[276]

As we have said in previous reports, at the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[277] Justice Gonthier emphasized the fact that the Band had considerable autonomy in deciding whether to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, a band's decision to surrender its land should be allowed to stand unless its understanding of the terms was inadequate or there were tainted dealings involving the Crown which make it unsafe to rely on the band's decision as an expression of its true understanding and intention.

In its submissions, Canada acknowledges a fiduciary duty to refuse the surrender if the [Turtle Mountain] Band's decision was so foolish and improvident as to amount to exploitation. It is, as Canada says, a duty "unique to the context of the surrender of reserve land."[278] In its submissions, Canada states that in considering the question of whether the Band's decision amounted to exploitation, the decision should be viewed from the perspective of the Band at the time. In particular, Canada draws attention to the following circumstances:

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[275] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 362.
[276] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 371.
[277] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 358, as cited in ICC, *Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 183.
[278] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 22.

- While no fixed price could be determined before the surrender, the Band could expect to receive the best price that could be had for the land.
- The surrender was in the interests of the remaining band members. Three of the remaining male members were elderly and could no longer farm the land. They could benefit from the proceeds of sale because they had no other sources of income or even sustenance, such as hunting and fishing.
- Because the reserve was some distance from the Agency, regular advice or assistance from the Indian Agent was lacking.
- Hdamani kept the best land for his own use, and it is unclear whether the younger members of the Band were allotted land for their own purposes.
- The proceeds of sale would be helpful in establishing the two younger male members of the Band and their families.
- The population of the reserve was diminished owing to the transfers to other reserves, and the Turtle Mountain reserve was no longer viewed by most members as desirable to live on (because, for instance, of the scarcity of natural resources).
- Both Bogaga and Tetunkanopa were concerned that if they did not agree to a surrender, Hdamani would somehow dispossess them of their interest in the reserve.

Taken together, Canada submits that, in these circumstances, there was no duty on Canada to refuse the surrender. Rather, Canada had legitimate reasons for pursuing the surrender; the methods used were lawful and beneficial to those concerned; and it was persuasion and the reality of their own circumstances which lead the majority of band members to the decision to surrender.[279]

In contrast, the First Nation asserts that Canada's use of its position of authority to influence unduly and orchestrate a taking of reserve lands by "surrender," whether applied at the departmental or at the Indian agent's level, constitutes "tainted dealings involving the Crown" which undermined the Band's decision-making autonomy. Specifically, the actions of the Crown have "an odour of moral failure about them."[280] The First Nation points to the "campaign" by departmental officials to close the reserve beginning in 1889, together with Indian Agent Markle's withholding of aid and rations as the means of inducing band members to accede to a departmental policy that wanted their removal from Turtle Mountain. Further, monetary inducements were offered in 1898 by Agent Markle for two families to relocate from Turtle Mountain to the Oak Lake Sioux Band. In fact, three families relocated to Oak Lake reserve. Two of the families received $40 each towards construction of new dwellings, and a third, Kibana Hota, moved in the expectation that the department would also supply him with lumber to a value of $40 to build a house at Oak Lake.[281]

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[279] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 26.

The First Nation further points in evidence to the department's "authorized use of threats" to Chief Hdamani, in addition to the persuasion, coercion by withholding of rations, and financial inducements offered by the department in its attempts to remove the Band from its reserve. Specifically, the First Nation points to Secretary McLean's June 23, 1898, letter to Agent Markle in which the Secretary impresses on the Indian Agent that "it might perhaps have some effect upon Chief Hadamani to threaten him with deposition, if his position as Chief has been in any way recognized."[282] While there is no evidence, as the First Nation correctly points out, to indicate that this threat was actually carried out, it is significant, in its view, that it was suggested and authorized. The First Nation admits, however, that subsequent to 1898, there do not appear to be any further documented actions taken by Agent Markle towards closure of the reserve. When Agent Hollies took over the position of Indian Agent in 1908, he proceeded to set forward his "plan" to achieve a closing of the reserve.

The First Nation characterizes Agent Hollies' actions as "zealous" in pursuing the department's policy of depopulating the reserve in order to have it "surrendered" for sale. Further, by 1909, the timing and the outcome of the surrender vote were totally within the control of Agent Hollies, according to the First Nation; as long as Bogaga was under Agent Hollies' "care and influence," he could be brought to a meeting to cast the deciding vote between

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[280] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 31.

[281] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, pp. 44–45.

[282] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 48, citing J.D. McLean, Secretary, Department of Indian Affairs, to J.A. Markle, Indian Agent, June 23, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 251).

Tetunkanopa, whom Hollies would also need to arrange to be present, and Chief Hdamani.[283]

In the First Nation's view, by the time of the actual surrender vote, the department had engaged in 20 years of "systematic depopulation" of the Turtle Mountain community, which had left the one man capable of casting the deciding vote "completely dependent upon Agent Hollies who obsessively wanted to obtain the 'surrender.'"[284] The First Nation argues that the power and influence of the Indian Agent over the Turtle Mountain Band was elevated because, in the mind of departmental officials, there were no treaty obligations and "anything done for [the Sioux] is a matter of grace and not of right."[285] The First Nation referred to a considerable amount of community evidence to exemplify the image of the Indian agent which had grown in the minds of the current residents of the Oak Lake and Oak River Bands. The agents were variously referred to as "the judge, he is the police, he is everything";[286] "the most important person that came from Indian Affairs to work in the communities";[287] "a tyrant, he was a crook."[288] Although it was clear to the Commission that the generation of elders we heard from would likely have been speaking about Indian agents in more recent years than during the time of Markle and Hollies, it was nevertheless clear that the relationship between the First Nation and the Indian agents was not one of mutual respect.

We have already said, and the record is clear, that the Crown wanted a surrender from the beginning of its relationship with the group. But Canada's motivation for a surrender is not enough. We agree with Canada's counsel that there must also be a "consideration about what the interests of the bands are."[289] Indian Agent Hollies' correspondence with Indian Commissioner Laird in January 1908 provides much insight into the thinking of the department about the problems on the reserve: because of its location (a distance of some 100 miles from the Agency), the reserve was subject to the influx of American Indians; there existed at least a perception of lawlessness and drunkenness; the reserve lacked a school, police, and a missionary; and the best arable lands were kept by Chief Hdamani. The department took all these factors into consideration in assessing the best interests of the Band. We also know from the community evidence that the Turtle Mountain residents were living with the threat of smallpox, and that some female members feared abuse by local settlers. The elders spoke plainly about the use of fire to chase away game from Turtle Mountain and the pressure to move from an area too close to the international border.[290]

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[283] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 61.

[284] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 64.

[285] Written Submission on Behalf of the Canupawakpa Dakota First Nation, July 25, 2002, p. 69, citing Hayter Reed, Indian Commissioner, Department of Indian Affairs, to Thomas M. Daly, Minister, Department of the Interior, April 21, 1891, NA, RG 10, vol. 3602, file 1840 (ICC Documents, Exhibit 1, pp. 139–40).

[286] ICC Transcript, December 7, 2001 (Exhibit 14a, p. 79, Stewart Gordon Westaste).

[287] ICC Transcript, December 7, 2001 (Exhibit 14a, p. 38, Eva McKay).

[288] ICC Transcript, December 7, 2001 (Exhibit 14a, p. 40, Eva McKay).

[289] ICC Transcript, October 22, 2002, and November 15, 2002, p. 139.

The department planned on relocating the band members to other Sioux reserves that had sufficient land available. There they would receive some of the proceeds of the sale of the reserve, money that would enable them to re-establish themselves in their new locations. The remaining Turtle Mountain band members were aware that their personal circumstances favoured a relocation to other bands, and they knew they would receive a share of the proceeds of sale. Finally, four months had elapsed from Agent Hollies' first meeting with Hdamani and Bogaga in April 1909 to the actual vote in August 1909, and over a year from the time when Hollies first formally introduced the prospect of surrender in 1908. The Band had adequate time to consider its best interests.

We think it important to observe that there is no evidence to suggest that the option of not surrendering the land was ever presented to the Band, even though the Band repeatedly expressed an intention to retain the reserve and Hdmani and his son ultimately voted to keep it. Nevertheless, there is evidence that the department wanted Agent Hollies to plan for the future of the remaining members of the Band. He knew by November 1908 that three of the eligible voters were elderly and could no longer support themselves independently on the reserve. Their feelings of helplessness, we believe, ultimately convinced Bogaga and Tetunkanopa that a surrender was in their interest. It can also be inferred that these members understood they would be cared for as residents of these reserves, since the lack of services at Turtle Mountain was the single most repeated factor in Agent Hollies' discussion with the members regarding surrender. The surrender document itself speaks to the future of the members – that they were to receive a share of the proceeds sufficient to "give the Indians a start in their new homes, and also sufficient to compensate the owners of the improvements situate on the land [at

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[290] ICC Transcript, December 7, 2001 (Exhibit 14A, pp. 63–67, 95, Kevin Tacan; p. 18, Stewart Gordon Wasteste; p. 210, Rosie Eastman).

IR 60]."[291] We also know that the Oak Lake Band received a share of the surrender proceeds in trust some 47 years after the fact.

On balance, we find that the Crown, as fiduciary, had a duty to ensure that, while patient in its pursuit and persuasive in its approach, the consequences of surrender were not exploitative and were in the best interests of the Band. In this case, the Crown had the obligation of ensuring that this band of Sioux, who first arrived in Canada as "refugees" and who ultimately came under the control of the department first "out of grace, not as of right" and then as beneficiaries of the Crown's fiduciary responsibilities, were prevented from entering into an exploitative bargain.

In our view, the evidence amply demonstrates that the Department of Indian Affairs saw the Band's intention to remain on Turtle Mountain IR 60 as an obstacle to be overcome. The Crown has a duty to honour and respect a band's decisions not only at the moment of surrender but at all points leading up to it. Consequently, its officials must refrain from engaging in "tainted dealings" that improperly influence the band at all times before the surrender vote.

The only documentary evidence in the record regarding the withholding of rations occurs some 18 years before the actual vote, and there is no evidence that this situation had any influence on any of the members. There were no transfers of members following Agent Markle's tactics, and there was no talk of surrender at this time within the community. As for other inducements, such as the offering of money to members in 1898 by Agent Markle, two families were given $40 each to build a new home. The third member, Kibana Hota, did not receive any money before relocating. Instead, the record indicates that the department was loath to create any expectation that it would provide assistance to all members who wanted to move away from Turtle Mountain. As Canada points out, the department was not "so intent upon obtaining a surrender as to provide inducements to those members who were not deemed needy."[292]

As for the threat to depose Chief Hdamani as "Chief," we agree with Canada's interpretation of the document as it relates to the continual threat of trespassers. Again, Agent Markle was reporting on the situation existing at Turtle Mountain in June 1898 – specifically, that Chief Hdamani was encouraging trespassers. Agent Markle was not writing in relation to the issue of surrender. Nonetheless, there is no evidence to suggest that this threat, if in fact it was communicated to Chief Hdamani, was ever implemented.

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[291] Turtle Mountain Band of Indians, Surrender and Affidavit, August 9, 1909, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 376 and 380).

[292] Written Submission on Behalf of the Government of Canada, September 24, 2002, p. 22.

Finally, we are not satisfied that the department carried out a "systematic depopulation" of IR 60. What we see from the evidence is the relocation of three families in 1898 during Agent Markle's time at the Agency, and another relocation of four families and a fifth male member during Agent Hollies' time at the Agency in 1908. There are no other known relocations during the intervening years leading up to the surrender. In each case, the department informed both Agent Markle and Agent Hollies that they needed "formal consent of the Band to which it is proposed to transfer any of these Indians, and also to get a written renunciation of the Indians removed to all title, claim or interest in the Reserve at Turtle Mountain."[293] We see from the evidence that the consents to transfer were executed in 1908. We have no evidence of the formal transfer of the members in 1898, yet each family received a share of the proceeds of sale following the surrender of IR 60. In our view, while the department made known its desire to relocate as many members of IR 60 as possible, it is also in evidence that it was prepared to accede to the wishes of as many members as were prepared to leave voluntarily. And while the decision to move may have been motivated by factors that the department was primarily in control of – namely, the provision of a school, a mission, supplies, and police – the decision to move was their own.

In conclusion, we cannot find, based on the totality of the evidence, that the department engaged in an unrelenting campaign amounting to tainted dealings. We find that the events leading up to the surrender at all times involved the consent of the individual members, both in their relocation and in their ultimate decision to surrender. We would be loath to undo the autonomy of the Band and its members to determine their future. Similarly, we find that, on balance, the decision of the Band, once given expression on August 6, 1909, was not exploitative, such that Canada would have been under to a duty to prevent its acceptance. Canada has therefore fulfilled its obligation in this regard.

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[293] J.D. McLean, Secretary, to A.E. Forget, Indian Commissioner, March 22, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 237).

FAIRNESS IN THE RESULT: OUR SUPPLEMENTARY MANDATE

The Commission has, since its inception, understood that it has a responsibility to the Governor in Council, described as a "supplementary mandate," to draw to the government's attention any circumstances where we consider the outcome to be unfair, even though those circumstances do not, strictly speaking, give rise to an outstanding lawful obligation. This is such a case.

The supplementary mandate of the Commission was first described in 1991 by then Minister of Indian Affairs Tom Siddon, in the following terms:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendation on how to proceed.[294]

Morever, in a 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes's letter makes two key points in relation to the Commission's jurisdiction:

> (1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair.[295]

The Commission has exercised this authority sparingly and only in unusual circumstances which give rise to a demonstrable inequity or unfairness that we feel should be drawn to the attention of the Government of Canada.

The Commission relies on its supplementary mandate in this case because the "outstanding lawful obligation" test, defined in the Specific Claims Policy, will not bring this historical grievance to a close in one fundamental way. Indeed, it seems to us that the claim put forward by the Canupawakpa Dakota First Nation has less to do with monetary compensation than it does with the recognition of the connection between these Sioux people and Turtle Mountain IR 60.

In 1898, the widow Kasto requested that the department reserve "two small pieces of land in which their friends are buried and which it is their intention [illegible word] with a post and wire fence."[296] The Indian Department approved of widow Kasto's request in June 1898, saying, "[T]he wishes of the Indians with regard to the burial plots referred to will, of course, be respected should the reserve be sold."[297] We can find no evidence that this wish was in fact respected. On the contrary, Elder Philip HiEagle spoke to the Commission about looking for the gravesites at Turtle Mountain, knowing that there are members buried at the reserve, but being unable to locate these sites today because they were never preserved.[298]

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[294] Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991, reproduced in (1995) 3 ICCP 244.

[295] Pauline Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993, reproduced in (1995) 3 ICCP 242.

As we have said in the past, circumstances often arise in the context of aboriginal land claims where it is possible to resolve a historical grievance and, simultaneously, create a great deal of good will with a minor investment of money. In pursuit of a just solution, and one that recognizes the deep spiritual connection these Dakota Sioux people have to this land, we believe that the Government of Canada should work with the Dakota Sioux people to acquire and properly designate the lands where the ancestors of the Turtle Mountain Band are buried. In our view, this designation can be done economically and in a manner that is respectful of all stakeholders who occupy, use, and enjoy the 640 acres that once made up IR 60. The Government of Canada does not have a legal obligation to undertake such a project, but in our view it would be the equitable and moral thing to do.

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[296] J.A. Markle, Indian Agent, to Indian Commissioner, May 24, 1898, NA, RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, pp. 242–43).

[297] Indian Commissioner to the Indian Agent, Birtle Agency, June 8, 1898, NA RG 10, vol. 3644, file 7785-1 (ICC Documents, Exhibit 1, p. 247).

[298] ICC Transcript, January 17, 2002 (Exhibit 14b, p. 214, Philip HiEagle).

PART V

CONCLUSION AND RECOMMENDATION

We have concluded that the *de facto* reserve Turtle Mountain IR 60 was validly surrendered in accordance with the provisions of the *Indian Act* and that Canada, as fiduciary in taking this surrender, conducted itself as a reasonable and prudent trustee. We nevertheless recommend, pursuant to our supplementary mandate, that the Government of Canada recognize the historical connection of the descendants of the Turtle Mountain Band to the lands once occupied by Turtle Mountain IR 60 and, in particular, the lands taken up by the burial of their ancestors.

RECOMMENDATION

That, after consultation with the Canupawakpa Dakota First Nation and the Sioux Valley Dakota First Nation, the Government of Canada acquire an appropriate part of the lands once taken up as Turtle Mountain IR 60, to be suitably designated and recognized for the important ancestral burial ground that it is.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine	Daniel Bellegarde	Sheila Purdy
Roger J. Augustine Commissioner	Daniel J. Bellegarde Commissioner	Sheila G. Purdy Commissioner

Dated this 15th day of July, 2003.

APPENDIX A

CANUPAWAKPA DAKOTA FIRST NATION INQUIRY
TURTLE MOUNTAIN SURRENDER CLAIM

1 **Planning conferences**	October 17, 2000 February 15, 2001 July 4, 2001

2 **Community sessions**

Sioux Valley First Nation reserve, December 7, 2001

The Commission heard evidence from Sioux Valley First Nation elders Marina Tacan, Jean Eagle, Wayne Wasicuna, Eva McKay, Aaron McKay, Hector, Don Pratt, Stewart Gordon Wasteste, Kevin Tacan, M. Hotain.

Canupawakpa Dakota First Nation reserve, January 17, 2002

The Commission heard evidence from Canupawakpa Dakota First Nation elders Rosealine Eastman, Frank Eastman, Chief Noella Eagle, Philip HiEagle, Fred Eastman, Agnes Young.

3 **Legal arguments**	Winnipeg, Manitoba, October 22, 2002 Winnipeg, Manitoba, November 15, 2002

4 **Content of formal record**

The formal record for the Canupawakpa Dakota First Nation Turtle Mountain Surrender Inquiry consists of the following materials:

- the documentary record (3 volumes of documents, with annotated index) (Exhibit 1)

- Exhibits 2–19 tendered during the inquiry
- transcript of community sessions (2 volumes)
- transcript of oral session (1 volume)
- written submissions of counsel for Canada and counsel for the Canupawakpa Dakota First Nation, including authorities submitted by counsel with their written submissions

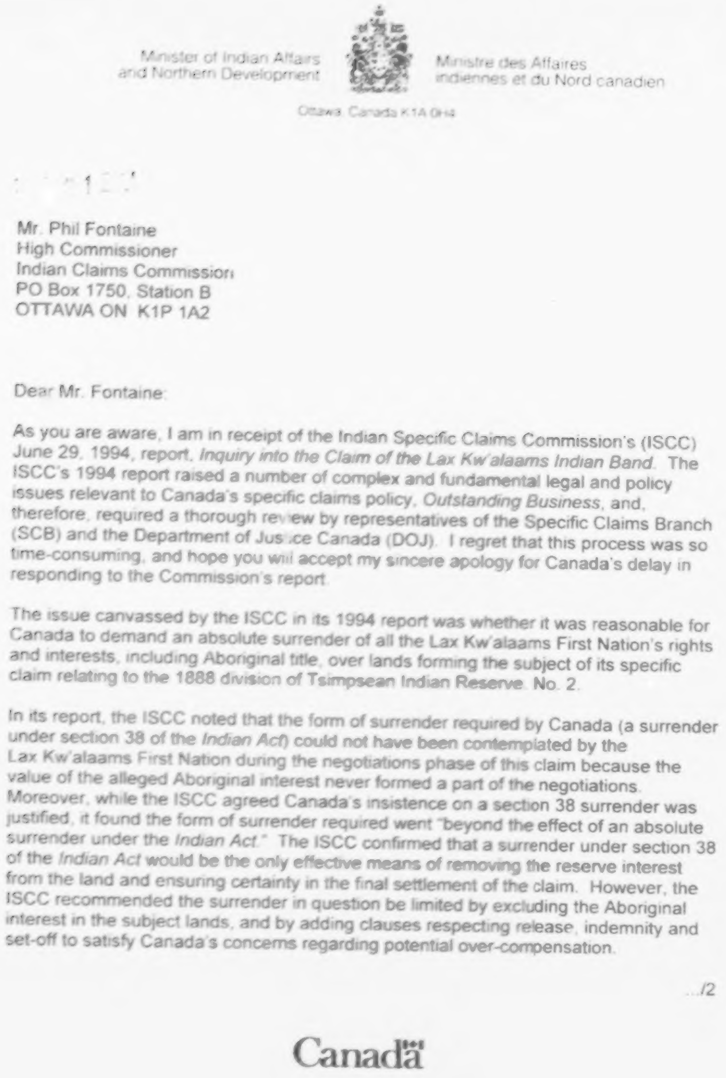
The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

RESPONSES

Re: La̲x Kw'a̲laams Indian Band Inquiry
Robert D. Nault, Minister of Indian Affairs
and Northern Development, to
Phil Fontaine, Indian Claims Commission,
December 31, 2001
355

Re: Friends of the Michel Society 1958 Enfranchisement Inquiry
Robert D. Nault, Minister of Indian Affairs
and Northern Development, to
Phil Fontaine, Indian Claims Commission,
October 2, 2002
357

Re: Roseau River Anishinabe First Nation Medical Aid Inquiry
Robert D. Nault, Minister of Indian Affairs
and Northern Development, to
Renée Dupuis, Indian Claims Commission,
September 17, 2003
359



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

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Mr. Phil Fontaine
High Commissioner
Indian Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Mr. Fontaine:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) June 29, 1994, report, *Inquiry into the Claim of the Lax Kw'alaams Indian Band*. The ISCC's 1994 report raised a number of complex and fundamental legal and policy issues relevant to Canada's specific claims policy, *Outstanding Business*, and, therefore, required a thorough review by representatives of the Specific Claims Branch (SCB) and the Department of Justice Canada (DOJ). I regret that this process was so time-consuming, and hope you will accept my sincere apology for Canada's delay in responding to the Commission's report.

The issue canvassed by the ISCC in its 1994 report was whether it was reasonable for Canada to demand an absolute surrender of all the Lax Kw'alaams First Nation's rights and interests, including Aboriginal title, over lands forming the subject of its specific claim relating to the 1888 division of Tsimpsean Indian Reserve No. 2.

In its report, the ISCC noted that the form of surrender required by Canada (a surrender under section 38 of the *Indian Act*) could not have been contemplated by the Lax Kw'alaams First Nation during the negotiations phase of this claim because the value of the alleged Aboriginal interest never formed a part of the negotiations. Moreover, while the ISCC agreed Canada's insistence on a section 38 surrender was justified, it found the form of surrender required went "beyond the effect of an absolute surrender under the *Indian Act*." The ISCC confirmed that a surrender under section 38 of the *Indian Act* would be the only effective means of removing the reserve interest from the land and ensuring certainty in the final settlement of the claim. However, the ISCC recommended the surrender in question be limited by excluding the Aboriginal interest in the subject lands, and by adding clauses respecting release, indemnity and set-off to satisfy Canada's concerns regarding potential over-compensation.

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Canada

As you may be aware, a thorough legal and policy review of the ISCC's recommendations with respect to Canada's section 38 surrender requirement took place within the SCB and the DOJ throughout 1998-1999. (This process was facilitated, in part, by former Commission counsel, Mr. Ron Maurice.) I understand representatives of the SCB and the DOJ met with ISCC counsel and members of the Lax Kw'alaams First Nation on several occasions, and explored a number of options for resolution of this impasse. Nonetheless, after careful consideration of the Commission's report, I regret that I am unable to accept the ISCC's recommendation with respect to modification of the form of surrender required by Canada for settlement of this claim.

With respect to the first of the ISCC's findings outlined above, it is Canada's view that since Aboriginal interests were never excluded from any of the appraisals considered during the negotiations stage of this claim, they cannot be considered to have been excluded from the discussions.

As regard to the form of surrender required for settlement of this claim, *Outstanding Business* requires that settlement of claims represent final redress of a First Nation's grievance. A formal release must be sought from a First Nation so that negotiations on the same claim cannot be reopened. Given this, Canada's position remains that a surrender under section 38 of the *Indian Act* is a legal requirement emanating from the terms of *Outstanding Business*. Moreover, Canada is of the view that it is legally impossible to exempt Aboriginal interests from the scope of a section 38 surrender without jeopardizing the legal effect of the surrender (i.e. without affecting the certainty Canada requires).

Although I recognize Canada's response to the issue canvassed in your report may not be satisfactory to the Lax Kw'alaams First Nation, we are, nonetheless, hoping to move towards settlement of this specific claim on the basis of a revised mandate. I would like to thank the ISCC and its counsel for their efforts to assist Canada and the First Nation to resolve this dispute.

Yours sincerely,

Robert D. Nault, P.C., M.P.

c.c.: Chief Garry Reece
Ratcliff & Company

Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

12

Mr. Phil Fontaine
Chief Commissioner
Indian Specific Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Mr. Fontaine:

As you are aware, I am in receipt of the Indian Specific Claims Commission's (ISCC) December 1998 report, *Friends of Michel Society Inquiry - 1958 Enfranchisement Claim*, dealing with the Friends of Michel Society's request for status to advance specific claims. I appreciate the careful and detailed consideration that the Commission brought to the issues.

In its report, the ISCC examined the following issue:

> "Do the 1985 amendments to the *Indian Act*, when coupled with the other provisions of the *Indian Act*, impose upon Canada a statutory obligation to reconstitute the Michel Band as a Band under the *Indian Act*, providing it with standing to bring a claim under the Specific Claims Policy?"

The Commission concluded that Canada is under no statutory obligation to recognize or reconstitute the Michel Band, and that the Friends of Michel Society has no standing to bring a claim under the Specific Claims Policy. The Commission recommended, though, that Canada:

> "...grant special standing to the duly authorized representatives of the Friends of Michel Society to submit specific claims in relation to alleged invalid surrenders of reserve land for consideration of their merits under the Specific Claims Policy."

After a careful review, Canada has declined to accept the ISCC's recommendation to grant the Friends of Michel Society special standing to advance specific claims. Canada's rejection of this recommendation is based on its continued view that specific

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claims, as defined in the Specific Claims Policy, can only be advanced by Indian Bands or groups of Indian Bands recognized under the *Indian Act*.

I would like to thank the Indian Specific Claims Commission for its consideration of this claim.

Yours sincerely,

Robert D Nault

Robert D. Nault, PC, MP

c.c.: Ms. Rosalind Callihoo

[Translation]

Minister of Indian Affairs
and Northern Development
Ottawa, Canada
K1A 0H4

September 17, 2003

Ms. Renée Dupuis
Chief Commissioner
Indian Claims Commission
Box 1750, Station "B"
Ottawa, ON K1P 1A2

Dear Ms. Dupuis:

As you are aware, I have received a copy of the Indian Claims Commission's February 2001 report on the specific claim of the Roseau River Anishinabe First Nation: *Roseau River Anishinabe First Nation Inquiry - Medical Aid Claim*. I was impressed with the thoroughness of the Commission's examination into this matter.

After having reviewed the matter carefully, Canada has decided to reject the Commission's recommendation that it negotiate compensation for medical aid payments with the First Nation. Furthermore, Canada will not be undertaking a review of medical aid to Indians, as the Commission also recommended in its report. I have consulted with my Cabinet colleague, the Honourable Anne McLellan, Minister of Health Canada, and she supports my decision. Let me assure you that the Government of Canada has always been, and continues to be, firmly committed to ensuring the welfare of Canada's native peoples.

I thank the Indian Claims Commission for having conducted the inquiry into this claim.

Yours sincerely,

(signed)

Robert D. Nault, P.C., M.P.
c.c.: Mr. Daniel Bellegarde
Mr. Terrance Nelson

THE COMMISSIONERS

Chief Commissioner Renée Dupuis has had a private law practice in Quebec City since 1973 where she specializes in the areas of aboriginal peoples, human rights, and administrative law. Since 1972 she has served as legal advisor to a number of First Nations and aboriginal groups in her home province, including the Indians of Quebec Association, the Assembly of First Nations for Quebec and Labrador, and the Attikamek and the Innu-Montagnais First Nations, representing them in their land claims negotiations with the federal, Quebec, and Newfoundland governments and in constitutional negotiations. From 1989 to 1995, Madame Dupuis served two terms as commissioner of the Canadian Human Rights Commission and she is chair of the Quebec Bar's committee on law relating to aboriginal peoples. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles, and lectured extensively on administrative law, human rights, and aboriginal rights. She is the recipient of the Quebec Bar Foundation's 2001 Award for her book *Le statut juridique des peuples autochtones en droit canadien* (Carswell), the 2001 Governor General's Literary Award for Non-fiction for her book *Quel Canada pour les Autochtones?* (published in English by James Lorimer & Company Publishers under the title *Justice for Canada's Aboriginal Peoples*), and the YWCA's Women of Excellence Award 2002 for her contribution to the advancement of women's issues. Madame Dupuis is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001, and Chief Commissioner on June 10, 2003.

Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first Vice-Chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self-governance, and human resource development in general. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission, on July 27, 1992 and April 19, 1994, respectively. He held the position of Co-Chair until August 2001.

Jane Dickson-Gilmore is an associate professor in the Law Department at Carleton University, where she teaches such subjects as aboriginal community and restorative justice, as well as conflict resolution. Active in First Nations communities, she has served as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on aboriginal culture, history, and politics. In the past, she provided expert advice to the Smithsonian Institution – National Museum of the American Indian on Kahnawake Mohawks. Ms Dickson-Gilmore has also been called upon to present before the Standing Committee of Justice and Human Rights and has been an expert witness in proceedings before the Federal Court and Canadian Human Rights Commission. Ms Dickson-Gilmore was born in Alberta and raised in British Columbia. She graduated from the London School of Economics with a PhD in law and holds a BA and MA in criminology from Simon Fraser University. Ms Dickson-Gilmore was appointed Commissioner of the Indian Claims Commission on October 31, 2002.

Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the Charlottetown *Guardian*, *Windsor Star*, and *Ottawa Citizen*. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, NS, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.

Sheila G. Purdy was born and raised in Ottawa. Between 1996 and 1999, she worked as an advisor to the government of the Northwest Territories on the creation of the Nunavut territory. Between 1993 and 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on matters related to the Criminal Code and aboriginal affairs. In the early 1990s, Ms Purdy was also special advisor on aboriginal affairs to the Leader of the Opposition. Previously, she provided legal services on environmental matters, and worked as a legal aid lawyer representing victims of elder abuse. After graduating with a law degree from the University of Ottawa in 1980, Ms Purdy worked as a litigation lawyer in private practice until 1985. Her undergraduate degree is from Carleton University, Ottawa. Ms Purdy is on the executive of the Canadian Biodiversity Institute, the Advisory Council of Canadian Arctic Resources Committee, and the Women's Legal, Education and Action Fund (LEAF). She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.